

1 UNITED STATES DISTRICT COURT  
2 FOR THE DISTRICT OF NEW JERSEY

3  
4 **IN RE: VALSARTAN PRODUCTS**  
5 **LIABILITY LITIGATION**

**CIVIL ACTION NUMBER:**

19-md-02875

6 **CASE MANAGEMENT CONFERENCE**

7 Mitchell H. Cohen Building & U.S. Courthouse  
8 4th & Cooper Streets  
9 Camden, New Jersey 08101  
10 July 28, 2022  
11 Commencing at 10:01 a.m.

12 **B E F O R E:**

**THE HONORABLE ROBERT B. KUGLER**  
**UNITED STATES DISTRICT JUDGE**

13 **THOMAS I. VANASKIE (RET.)**  
14 **SPECIAL MASTER**

15 **A P P E A R A N C E S:**

16 MAZIE SLATER KATZ & FREEMAN, LLC  
17 BY: ADAM M. SLATER, ESQUIRE  
18 103 Eisenhower Parkway  
19 Roseland, New Jersey 07068  
20 For the Plaintiffs

21 HONIK LLC  
22 BY: RUBEN HONIK, ESQUIRE  
23 1515 Market Street, Suite 1100  
24 Philadelphia, Pennsylvania 191032  
25 For the Plaintiffs

Ann Marie Mitchell, CRR, RDR, RMR, Official Court Reporter  
AnnMarie\_Mitchell@njdcourts.gov  
(856) 576-7018

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**A P P E A R A N C E S (Continued) :**

SERIOUS INJURY LAW GROUP P.C.  
BY: JOANNA JONES, ESQUIRE  
9617 Parkway E  
Birmingham, Alabama 35215  
For the Plaintiffs

LIEFF CABRASER HEIMANN & BERNSTEIN  
BY: RACHEL GEMAN, ESQUIRE  
250 Hudson Street, Eighth Floor  
New York, New York 1003  
For the Plaintiffs

GREENBERG TRAURIG LLP  
BY: STEVEN M. HARKINS, ESQUIRE  
3333 Piedmont Road, NE, Suite 2500  
Atlanta, Georgia 30305  
For the Defendants, Teva Pharmaceutical Industries Ltd.,  
Teva Pharmaceuticals USA, Inc., Actavis LLC,  
and Actavis Pharma, Inc.

GREENBERG TRAURIG LLP  
BY: GREGORY E. OSTFELD, ESQUIRE  
77 West Wacker Drive, Suite 3100  
Chicago, Illinois 60601  
For the Defendants, Teva Pharmaceutical Industries Ltd.,  
Teva Pharmaceuticals USA, Inc., Actavis LLC,  
and Actavis Pharma, Inc.

BARNES & THORNBURG, LLP  
BY: KARA KAPKE, ESQUIRE  
11 S. Meridian Street  
Indianapolis, Indiana 46204  
For the Retailer Defendants and CVS Pharmacy, Inc., and  
Rite Aid Corporation

KENNEY SHELTON LIPTAK NOWAK LLP  
BY: DANIEL CARTWRIGHT, ESQUIRE  
4615 North Street  
Jamesville, New York 13087  
For the Defendant, Tops Test Facility 990

**ALSO PRESENT:**

LORETTA SMITH, ESQUIRE  
Judicial Law Clerk to The Honorable Robert B. Kugler  
Larry MacStravic, Courtroom Deputy

1 (PROCEEDINGS held telephonically before The Honorable  
2 ROBERT B. KUGLER and SPECIAL MASTER THOMAS I. VANASKIE at  
3 10:01 a.m.)

4 THE COURT: Judge Vanaskie, are you on board?

5 SPECIAL MASTER VANASKIE: Yes, I am, Judge Kugler.  
6 How are you doing?

7 THE COURT: Fine and dandy, enjoying the summer.

8 Okay. Look, there's a number of issues that we want  
9 to talk about today.

10 Let's start with the easy part. Mr. Harkins, are you  
11 on the phone? Mr. Harkins?

12 MR. HARKINS: Yes, Your Honor, I'm here. This is  
13 Steve Harkins with Greenberg Traurig for Teva and the joint  
14 defense group.

15 THE COURT: Do you want do that paragraph 3 of the  
16 defense letter, we'll talk about?

17 You apparently -- on the 12 orders to show cause, you  
18 want to dismiss half of them, the other half you want to move  
19 to next time; is that correct?

20 MR. HARKINS: Yes, that's correct, Your Honor. There  
21 was one update.

22 We will also agree to withdraw number 6, William  
23 Davis, and then just carry the five others that we noted in  
24 our position statement forward for another month.

25 THE COURT: Okay. Let's do that then.

1 As to the pending orders to show cause, the Payne,  
2 P-A-Y-N-E; Callahan; Anderson; Walker, Williams; and White  
3 cases, those orders to show cause are dismissed.

4 As to the Shemes, S-H-E-M-E-S; King; Tolley; Peyton;  
5 Branch; Vindigni, V-I-N-D-I-G-N-I, those matters are carried  
6 for a month and would appear on next month's order to show  
7 cause list.

8 And that leaves five -- four new ones to be listed  
9 for next month, orders to show cause.

10 Estate of Robert Cooper v. ZHP, that's the Levin  
11 firm.

12 Anybody want to speak on that matter?

13 MR. NIGH: Yes, Your Honor. We don't have any  
14 objection to entering an order to show cause. I just would  
15 say that our missing thing is medical billing. We don't that  
16 really rises to the standard of a core deficiency, but I think  
17 we can have that battle next month if for some reason we can't  
18 still get that medical billing.

19 THE COURT: Okay. Thank you.

20 That will be listed for an order to show cause.

21 Number 2 is Raymond Dais, D-A-I-S. That's the Dennis  
22 F. O'Brien firm.

23 Anybody want to speak on that matter?

24 (No response.)

25 THE COURT: Nope, okay. That will be listed for

1 dismissal next month.

2 Third is Elie, E-L-I-E, Greene, G-R-E-E-N-E. That's  
3 the Serious Injury Law Group.

4 Any want to speak on that?

5 MS. JONES: Yes. This is Joanna Jones on behalf of  
6 Gerald Brooks. The update is really the same as last week.  
7 We've hired an attorney to open up the estate, so we're just  
8 kind of waiting on the estate to be opened up so we can  
9 proceed.

10 THE COURT: Okay. Well, we have another month to try  
11 to work that out. If not, then you can always talk to  
12 Mr. Harkins before next month to try to carry it again. Okay?

13 And then there's Marjorie Smith as administrator of  
14 the estate of Erskine Smith.

15 Anybody want to talk on that?

16 MS. JONES: Yes. This is Joanna Jones again.

17 The plaintiff fact sheets have been amended to fix  
18 the errors. Also appropriate authorizations were filed this  
19 week. The only things that we're missing is the mental health  
20 records that were requested, and we have requested those,  
21 we're just waiting for them to come in.

22 THE COURT: Okay. Well, you've got another 30 days  
23 to try to work that out with Mr. Harkins. But we'll list that  
24 for next month's orders to show cause. Okay?

25 MS. JONES: Thank you.

1 THE COURT: Then there are ten cases that Mr.  
2 Harkins -- the defense has listed to be relisted.

3 Any updates on those, Mr. Harkins?

4 MR. HARKINS: Yes, Your Honor, a number of updates.  
5 We can remove number 1, Connie Keep; number 2, Sandra Russell;  
6 number 7, Frances Cain; and number 10, Carrie Collins. And  
7 the rest of the cases would be just carried forward for  
8 another month.

9 THE COURT: Okay. Then that will be number 3, Debra  
10 Stiles, S-T-I-L-E-S; number 4, Jim Smith; number 5, Frank  
11 Trimboli, T-R-I-M-B-O-L-I; number 6, Audrey Dequeant,  
12 D-E-Q-U-E-A-N-T; number 8, Walid Elganam, E-L-G-A-N-A-M; and  
13 number 9, Richard Wilson. Richard Williams, I'm sorry. We'll  
14 list those for next month again for another listing.

15 All right. Let's get right to the case management  
16 issues that are raised, the dispute between the plaintiffs and  
17 the defendants about trying to figure out the third-party  
18 payor, TPP, case to go to trial in this case.

19 And defense has raised a number of issues, some of  
20 which need to be discussed.

21 I'm not concerned about the entire controversy  
22 doctrine. That wouldn't prevent me under Rule 21 to sever  
23 certain granting parties.

24 Class certification motions, that is an issue because  
25 of one-way intervention.

1           We are working on those, folks. They're a lot of  
2 work, but we are working on them. And we hope to have them in  
3 the not too distant future resolved.

4           But that leaves I think a really difficult issue that  
5 we have to talk about, the trials. And that's the *Lexecon*  
6 problem.

7           Now, I haven't seen any waivers from any defendants  
8 that would permit me to try any of these cases, and I think  
9 *Lexecon* implicates the plaintiffs' proposal here. So that's  
10 an issue that needs to be addressed.

11           And the personal jurisdiction issue that was raised  
12 by defense counsel was addressed sort of two days ago by the  
13 Third Circuit in that Fischer case, that opt-in FLSA case with  
14 the out-of-state plaintiffs. So that continues to be a bit of  
15 an issue. That has to be resolved.

16           Who's going to speak for the plaintiffs on the  
17 *Lexecon* problem, if anybody?

18           MR. HONIK: Good morning, Your Honor. This is Ruben  
19 Honik. I'll be addressing the case management issues.

20           THE COURT: Okay. What are we going to do about the  
21 *Lexecon* problem?

22           MR. HONIK: Your Honor, I understand how the issue  
23 has been framed, but the defendants have really cited nothing  
24 that prevents the Court from certifying consumer or TPP  
25 classes and subclasses, adjudicating summary judgment and



1 pretrial motions, and then severing and remanding cases to  
2 transferee courts. That's point number one.

3 Point number two, perhaps even more important, is  
4 that at least one named plaintiff in each of the two proposed  
5 trial groupings have originally filed complaints in the  
6 District of New Jersey, meaning that this court already has  
7 jurisdiction and venue over an original action that doesn't  
8 require transfer.

9 And for the record, that would be the Brian Wineinger  
10 case which was filed before you, Judge, against Solco and  
11 Princeton.

12 That permits you to proceed at the least as to that  
13 case without a waiver, and therefore, I don't believe Lexecon  
14 is implicated.

15 THE COURT: Was the Wineinger case, was it filed as a  
16 result of a direct filing order, or was it filed independent  
17 of your direct filing order?

18 MR. HONIK: My best --

19 THE COURT: I mean, should it really be in New  
20 Jersey?

21 MR. HONIK: Yes, Judge, it really should be in New  
22 Jersey. And unless someone can correct me from our team, that  
23 was originally filed in New Jersey before you at 19-cv-01070  
24 in April of 2019 against defendant subsidiaries in New Jersey.

25 So that case is I think teed up and ready to go with

1 or without a waiver for this Court to proceed. And in any  
2 event, if the Wineinger case was not extant, the Court would  
3 still be in a position to certify classes, adjudicate summary  
4 judgment and pretrial motions and sever and remand. And  
5 that's precisely what the MDL rules and Rule 23, you know,  
6 consider the pathway.

7 MR. SLATER: Your Honor, it's Adam Slater. Also, I  
8 believe that some of the defendants are actually based in New  
9 Jersey as well.

10 MR. HONIK: Well, that goes without question on the  
11 personal jurisdiction side, Judge. We know that Solco,  
12 Princeton, US Huahai, Teva USA, Teva subsidiaries, Actavis, and  
13 Torrent USA are in New Jersey in a very profound way. And to  
14 state the obvious, these defendants have been in the  
15 litigation for four years. To whatever extent they think they  
16 still have a personal jurisdiction challenge, certainly that  
17 can be brought up in a dispositive motion. And I don't want  
18 to get ahead of myself or in front of my skis, but I don't  
19 think there's a personal jurisdiction -- meaningful personal  
20 jurisdiction challenge in the least.

21 THE COURT: What you're proposing is at the very  
22 least we just keep going and get to the dispositive motions,  
23 and then at that point if I don't have jurisdiction over the  
24 case, then they'll send it back.

25 Is that what you're saying?

1 MR. HONIK: That's right, Judge. And just to take a  
2 half step back and maybe frame the discussion that might be  
3 useful, when the cert briefing was complete, it certainly  
4 occurred to the plaintiffs that we needed the Court to step in  
5 and provide some case management direction for merits and  
6 expert reports and dispositive motions. And that went  
7 directly to what you conveyed to the parties correctly, which  
8 is we've got to keep this case moving.

9 And as both Judge Vanaskie and you are aware, we have  
10 proposed a schedule. We conferred with the defendants. It  
11 was somewhat modified and tacked on an additional 60 days  
12 because of some protestation by the defendants.

13 And we now have Case Management Order Number 28,  
14 which has been docketed. And we have a timetable for the  
15 exchange of expert reports and dispositive motions with the  
16 hope that we're going to have an economic trial of some sort  
17 in the very near future to move this case along.

18 And the defendants, faced with this case management  
19 order and an expression from us that plaintiffs, we in fact  
20 were going to pursue dispositive motions, complained that it  
21 was untethered, that was the very word they used repeatedly at  
22 our last conference, untethered to any particular claim, any  
23 particular defendant, any particular plaintiff.

24 And we responded, just as we said we would to Judge  
25 Vanaskie over a week ago now. And we proposed what we think

1 is the most sensible management grouping possible in proposing  
2 a first consumer class based on warranty, both implied and  
3 expressed. The defendants now know precisely which defendants  
4 we'd like to go after first in a trial, namely, ZHP, Teva and  
5 Torrent.

6           The reason Teva and Torrent are in, because they use  
7 ZHP API. They're very significant defendants in this  
8 litigation, as everyone well knows. And in many respects, the  
9 warranty claims and the consumer warranty claims are among the  
10 very straightforward, most streamlined of claims possible that  
11 can be tried. They implicate every one of the legal and  
12 factual issues that implicate the bodily injury claims.

13           And we were very mindful in proposing it. We think  
14 too that dispositive motions can clearly be filed on warranty,  
15 because the Court has shed considerable light in its Rule 12  
16 opinions about how the warranty analysis should apply here.

17           And so when it's all said and done, we think because  
18 of the alignment between consumer economic claims and consumer  
19 BI claims, among all the possible grouping choices, that  
20 presents the greatest efficiency.

21           And let me say, Judge -- and we attached this as an  
22 exhibit to our reply brief in our cert briefing -- the Federal  
23 Judicial Center really provides guidance that is very much in  
24 line with what we've proposed.

25           If the Court were to look again or refresh itself on

1 an excellent primer that the Judicial Center has authored in  
2 2018 called Managing Related Proposed Class Actions of  
3 Multidistrict Litigation, one would find on page 5 the very  
4 topic that we're talking about today, namely, how to group for  
5 motion practice and discovery and for trial.

6 And if I may, the guidance from the Judicial Center  
7 says, and I quote: "Typically cases are split up by plaintiff  
8 type, but judges' creativity in meeting the challenges  
9 presented by multiclass MDL proceedings is unlimited."

10 That's in the text, not my word.

11 "Cases" can "be split up by the nature of the claims  
12 brought...or by time of filing. Plaintiffs" can "be grouped  
13 based on whether they have opted out of arbitration or not.  
14 In antitrust proceedings, cases" can "be grouped based on  
15 which subset of defendants is being sued."

16 And the guidance goes on to give illustrations in  
17 both the complexity of the task but how grouping can  
18 facilitate litigation.

19 And it cites, for example, Judge, the Blue Cross Blue  
20 Shield Antitrust Litigation. And it's very instructive here.

21 There in that litigation there were two tracks.  
22 There were subscribers and providers, which are roughly  
23 analogous to direct and indirect purchasers, and within each  
24 track there are multiple alleged classes divided by regional  
25 market.

1           Now, if we stop for a second, that very example is  
2           precisely what we have here. Completely analogous to indirect  
3           and direct purchasers, subscribers and providers is what we  
4           have in the form of consumers and TPPs.

5           Here the direct purchaser is really the consumer.  
6           They're the ones that got the warranty in their hand. There's  
7           a slight difference in that analysis when we get to the TPPs,  
8           because they simply paid for a part of the purchase. But the  
9           consumer stands in the exact position of a direct purchaser in  
10          an antitrust case. And that is among the reasons that we  
11          really proposed that as an initial class trial to proceed and  
12          to work up in the way of dispositive motions.

13          That really will engender and encompass and implicate  
14          the greatest number of common issues, both legal and factual,  
15          on both the BI side and the economic side, whereas the TPP has  
16          certain wrinkles in it that I think makes it not entirely sui  
17          generis, but not as aligned as a consumer economic class, as a  
18          BI class.

19          Now, let me conclude by saying the plaintiffs stand  
20          absolutely prepared, Judge, to work up for trial or toward  
21          trial any grouping that the Court desires. And in fact, the  
22          Court has tremendous flexibility in terms of sequencing and as  
23          has been done by, among others, Judge Weinstein in Zyprexa,  
24          more recently in the Juul case.

25          You're even at liberty to issue tentative rulings

1 both as to summary judgment, as to class and so forth, to  
2 provide guidance to the parties about how to proceed to tee up  
3 the issues in this case.

4 And so, you know, we hope and implore the Court to  
5 consider our proposal which encompasses major defendants,  
6 common facts on both the BI track and the economic track by  
7 suggesting a consumer warranty class as the first case to go.  
8 But I dare say if the Court decides, for example, that we're  
9 not going to do ZHP, we want to do Hetero first, that's fine  
10 too. If the Court directs that we do a TPP class trial first,  
11 it's -- after a certification ruling, we're prepared to do  
12 that.

13 But we think in the best of all worlds, a consumer  
14 class based on warranty is the cleanest. We can narrow it  
15 down even further by dispositive motions. And I think it will  
16 be the biggest, if you will, legal bang for the buck in terms  
17 of moving this case forward towards some sort of resolution.

18 THE COURT: Mr. Trischler, you signed the letter. Do  
19 you want to speak on this, or do you have someone else who is  
20 going to speak on this?

21 MR. OSTFELD: Good morning, Your Honor. This is Greg  
22 Ostfeld. I'll be speaking on this issue on behalf of the  
23 objecting defendants.

24 THE COURT: Okay. Great, thank you.

25 MR. OSTFELD: Your Honor, I certainly appreciate

1 Mr. Honik's presentation on this. And with due respect to  
2 him, it sort of feels like we're going backwards a little bit.

3 The Court already exercised its creativity in  
4 accordance with the guidance of the Judicial Center at the  
5 June 1st hearing. And we took the Court's guidance to heart  
6 and agree with the Court that the first economic loss trial  
7 should be relatively straightforward and should not be  
8 piecemeal.

9 And we feel the Court was fairly clear, you indicated  
10 that we should for purposes of this first trial -- and we took  
11 the goal to be setting a case that could proceed to trial, not  
12 towards piecemeal proceedings. The goal should be to focus on  
13 the third-party payor economic loss cases.

14 And as Your Honor prudently noted, the reason for  
15 that is because those cases are likely to go forward  
16 irrespective of the outcome of the forthcoming class  
17 certification ruling. It doesn't require a predisposition or  
18 an assumption as to how the Court is going to rule and what  
19 it's going to do with the class certification rulings. It  
20 doesn't require us to go through the Rule 23(f) review  
21 process. It doesn't require us to define the parameters of  
22 the classes, you know, what they're going to do, or guess at  
23 what they're going to be. We can simply proceed to work up a  
24 third-party payor, which is what the Court indicated it would  
25 like to see done, and to advance it towards trial.



1           Whatever the merits of Mr. Honik's proposal, and we  
2           have a lot of disagreements with them, it is a certainty that  
3           that will be a piecemeal proposal. It will not be relatively  
4           straightforward. And it cannot lead to a single trial.

5           And the reason for that is it involves 12 plaintiffs  
6           from 10 states. It involves 48 proposed subclasses. It  
7           involves 28 jurisdictions.

8           Putting aside the many reasons we have indicated why  
9           that is not workable at all as a class certification proposal,  
10          it is certainly not triable before this Court.

11          As Your Honor noted, there are personal jurisdiction  
12          and *Lexecon* issues. Some of the defendants are subject to  
13          this Court's general jurisdiction. Many of them are not. And  
14          Your Honor to this point has declined to hear personal  
15          jurisdiction motions. But if the time comes where we start to  
16          work up a case for trial, it will certainly be time to hear  
17          those personal jurisdiction issues, which the Court expressly  
18          reserved to this point.

19          There are multiple foreign defendants who have never  
20          had their personal jurisdiction arguments heard. There are  
21          also a number of plaintiffs who are from out of state who  
22          either direct filed into this court or filed in other states.  
23          There have been no *Lexecon* waivers.

24          So it is a certainty that the path that Mr. Honik has  
25          proposed cannot lead to a single, simple, straightforward

1 trial before this Court. It can only lead to a jumbling of  
2 proceedings, a mélange of proceedings which we take to be  
3 inconsistent with the Court's preference. What the Court  
4 wants us to do was set aside, as Your Honor put it, the  
5 obsessive focus on these class action motions, proceed to a  
6 third-party economic loss case, identify one that can be tried  
7 and move that. Your Honor said that we don't want to  
8 piecemeal these things. And what we're going to be doing here  
9 most certainly would be piecemealing them.

10 The plaintiffs have not proposed to just put  
11 Mr. Wineinger's case before the Court and put that on a trial  
12 track, they proposed to put 12 plaintiffs' cases before the  
13 Court. And it is not possible to do with that what the Court  
14 wants to do, which is try to move, to really advance the  
15 ultimate termination of this litigation, to get some guidance  
16 from a trial that can then inform the parties with respect to  
17 settlement, with respect to the course of future classes.

18 It is not a simplifying procedure the plaintiffs are  
19 proposing. They are proposing a complicating procedure, one  
20 that is going to spin off in hundreds of different directions,  
21 one that may have to be put on pause if there is a Rule 23(f)  
22 review by the Third Circuit, one that could be rendered futile  
23 if Your Honor denies class certification or moves in a  
24 different direction than the parties are conjecturing the  
25 Court may go. And it would just be a guess or a conjecture at

1 this point. That is really the one-way intervention problem.

2 We understand and appreciate that the Court is  
3 working hard on those class certification rulings. And it's a  
4 large task, and we certainly don't begrudge the Court the time  
5 it will take to do that.

6 But until it is done, we do have a one-way  
7 intervention problem. We have a problem of cases proceeding  
8 on the merits in such a way that would enable class members to  
9 wait and see how it goes and then decide whether or not  
10 they're going to get involved or not.

11 And, Your Honor, we certainly understand that Your  
12 Honor can sever cases, that you can solve the entire  
13 controversy and claim preclusion and claim splitting issue by  
14 severing cases, but plaintiffs right now are proposing to work  
15 up specific claims on behalf of the same named plaintiffs  
16 while leaving others on the sidelines.

17 And while Your Honor can certainly solve the entire  
18 controversy and claim splitting issue by having all of one  
19 plaintiff's claims severed out and tried in one proceeding, we  
20 respectfully do not think that Third Circuit precedent would  
21 allow an individual plaintiff's claims to be split into  
22 multiple proceedings and multiple trials arising -- against  
23 the same defendant arising out of the same event.

24 So respectfully, Your Honor, we think the goal should  
25 be to get back on track, get back to the mission Your Honor

1 articulated at the June 1st hearing and move towards a single  
2 plaintiff/third-party payor trial that can be tried as a  
3 discrete, non-piecemeal proceeding and that would materially  
4 advance the ultimate termination of this litigation.

5 This is putting the cart before the horse, Your  
6 Honor. To proceed on this before Your Honor has entered a  
7 class certification ruling, to proceed on a class claim until  
8 Your Honor has ruled on class certification and until the  
9 Third Circuit has at least been given the opportunity to say  
10 whether it is going to weigh in would be putting the cart  
11 before the horse.

12 THE COURT: Thank you.

13 Mr. Honik, I get where you're going with all this.  
14 And it's a good effort, but I still believe that the best way  
15 to proceed to the first trial is a single TPP plaintiff, which  
16 implicates, you know, only maybe a few states' laws and things  
17 of that nature.

18 MR. HONIK: Your Honor, here's how we see the problem  
19 with that approach.

20 The TPP plaintiffs in this case have a fully briefed  
21 motion for class certification before you on behalf of a  
22 class. To try either MSP or MADA's individual claims while  
23 that motion for certification is pending would bring about  
24 ironically the very one-way intervention that defendants claim  
25 they are seeking to avoid.

1           The -- respectfully, the MSP and MADA class members  
2   are entitled to have a ruling on their cert motion before  
3   there's a review of their merits in a trial or other  
4   proceeding. And by doing otherwise I think would violate MSP  
5   and MADA's due process rights in the same way that defendants  
6   maintain theirs would be violated in the event of some  
7   substantive ruling as to their rights.

8           And I want to emphasize that at no time have we ever  
9   proposed that we proceed either on summary judgment, as to  
10   summary judgment, or a trial before the Court has an  
11   opportunity to weigh in on one or more of the proposed  
12   classes. We think the proper sequencing -- and the Court has  
13   alluded to it -- is to have at least some ruling, even if it's  
14   not a dispositive ruling, can be, you know, an informative  
15   ruling to us, but likely a final ruling on one or more  
16   classes, followed by a notice period during which the parties  
17   have put on your desk, Judge, dispositive motions to narrow  
18   the issues as we get closer to trial disposition, motions in  
19   limine and the like, and then get ready to proceed.

20           And certainly if after that process Your Honor feels  
21   that the TPP class is the first one to go, we're ready to go  
22   and we'll do it.

23           The reason we proposed a consumer class is because we  
24   believe in the best of all worlds. Both the legal and factual  
25   issues of consumers as the -- essentially the direct

1 purchasers here really implicate the greatest number of issues  
2 for a factfinder to determine.

3           That is not entirely true as to TPPs, because as Your  
4 Honor knows, they weren't handed this prescription. They  
5 didn't have the label. They didn't consume this drug, which  
6 created an increased risk of an adverse health effect, and as  
7 to our BI clients actually created an adverse health effect.  
8 So we think in the best of all worlds, a consumer economic  
9 class is the one that really implicates the greatest number of  
10 issues.

11           And let me just add further that there's a lot of  
12 skin in the game with the economic class. The class that we  
13 proposed, strictly the ZHP/Teva/Torrent express warranty and  
14 implied warranty groups -- which, by the way, all of the  
15 states that we've grouped together have identical law. So  
16 this business, which is really a rehash of their opposition to  
17 our cert motion, is really without air.

18           But putting that aside for the moment, we're talking  
19 about damages that have been modeled in excess of  
20 \$100 million. That's strictly for warranty, strictly for  
21 Teva, Torrent and ZHP. And we think that that would be a very  
22 meaningful first trial which would implicate the greatest  
23 number of issues, including legal issues for the TPP, but the  
24 consumers are the ones that were the direct purchasers here.

25           The guidance from the Federal Judicial Center clearly

1 speaks in the MDL and particularly the antitrust setting of  
2 having the lead cases be the direct purchasers, indirect  
3 purchasers, or the providers coming after the subscribers.

4           The concept there, Judge, is that that's where the  
5 rubber met the road. Our consumers were the ones that went  
6 into these pharmacies, were told they were buying valsartan  
7 and didn't get valsartan. And we think that summary judgment  
8 on warranty will further narrow the issues and present the  
9 cleanest, most efficient way to proceed, and frankly, to  
10 expose the parties to enough skin in the game that could  
11 potentially globally move toward a resolution of the entire  
12 litigation.

13           THE COURT: I'm not sure having a trial with the most  
14 possible issues moves us as quickly as we need to to the final  
15 resolution of this case, to be honest with you. I understand  
16 what you're saying, because it does put pressure on the  
17 defendant to face a consumer case where you have actual people  
18 talking about their prescriptions and the stakes being, as you  
19 say, \$100 million or maybe more.

20           But I still think the question we need to have  
21 answered or seem to need to have answered is whether or not  
22 this stuff was contaminated and whether it was worth anything,  
23 you know, to the purchasers or anyone else who paid for it.  
24 And I think the easiest way, the fastest way to get there is a  
25 TPP single plaintiff case, to be honest with you. I continue

1 to believe that.

2 MR. HONIK: Your Honor, I understand that. I took to  
3 heart many of your comments before today about the value of  
4 bellwether personal injury cases. And I happen to share your  
5 view about them. But I think that's what we would be  
6 engendering by having an isolated TPP case.

7 So let's say we tee up MADA's individual claim here  
8 in order to hopefully tease out some specific issues that  
9 really do cut across all the claims here.

10 If MADA were to lose their individual trial, it  
11 wouldn't dispose of anything. MSP would still have claims.  
12 And obviously there would be the issue of class certification  
13 for TPPs. There may be any number of individualized reasons  
14 why MADA, just to use an example, might not prevail in a sort  
15 of bellwether trial.

16 So in my view, in our view, Judge, as we really spent  
17 time thinking about this, effectively having a single  
18 bellwether isolated trial for one TPP not only I think  
19 potentially involves due process issues when there are pending  
20 motions, but as a practical matter, it doesn't really move the  
21 needle or potentially won't move the needle, because if -- in  
22 my hypothetical, if MADA were to lose it, it's just like  
23 losing a BI bellwether trial. We move on to the next one.  
24 And I think that that will prolong the litigation.

25 I think in the best of all worlds, respectfully, if



1 the Court is presently honing in on, you know, considering our  
2 certification motion, whether as to all of the proposed  
3 classes or even just one subclass, namely, warranty for  
4 ZHP/Teva/Torrent, to me, that really -- that really produces a  
5 big bite.

6 And again, we reiterate that we're prepared to do any  
7 combination or any grouping that the Court wants. If you want  
8 a smaller bite with Hetero, just for example, we're happy to  
9 do that. But we think going in the direction of consumer  
10 economic class issues really is the way to go, because it's  
11 nonspecific. It has no individualized issues that they  
12 pertain to someone paying for a prescription rather than the  
13 consumer who really is the direct purchaser here.

14 THE COURT: Well, what happens if you lose your  
15 consumer case, now where are we?

16 MR. HONIK: Then there's preclusive effect. We've  
17 rolled the dice on a class-wide basis for the economic group,  
18 and we've lost on the warranty claim.

19 And if you severed out, which is your right to do,  
20 and it's done all the time by transferee judges, if we do just  
21 warranty, then the next trial it can be with the same jury, we  
22 look at the fraud issue. But we think that the warranty issue  
23 is the first big one to go. And if we lose it, to answer your  
24 question, then it's preclusive as to the economic claims based  
25 on warranty.

1 MR. OSTFELD: Your Honor, this is Greg --

2 THE COURT: -- very much, to be honest with you. If  
3 you lose that one, I don't think it's -- I don't think we're  
4 any worse off if we lose that one than we would be if we lose  
5 the TPP individual case in terms of where we end up down the  
6 road with all these cases.

7 MR. HONIK: Well, I take your point, Judge, but I  
8 really do believe that we have a one-way intervention problem,  
9 not with what the defendants are concerned with but by picking  
10 out an isolated TPP individual claim when there is already a  
11 pending motion to certify a class.

12 And that directly implicates the one-way intervention  
13 problem that the defendants are complaining about, which  
14 frankly don't exist for them but I think would be a present  
15 problem for either MSP or MADA who, you know, have and should  
16 have a full and fair opportunity to be heard on their Rule 23  
17 motion to certify a class of which they're a member.

18 THE COURT: They're going to get the opportunity to  
19 be heard on class motions. Like I said, we are endeavoring to  
20 get those done and we will get them done. It just takes time  
21 to get this stuff done.

22 Anyway, thank you, but I'm not convinced that we need  
23 to go that route that the plaintiffs are suggesting, the  
24 consumer route. I still believe we're going to go through  
25 with the TPP individual trial first. That will be the first

1 trial.

2 I'm not suggesting we want to do this tomorrow,  
3 folks. There's a lot to be done yet. But that's -- I  
4 continue to believe that that's the best way to head this case  
5 to final resolution.

6 I think simple is better, to be honest with you.

7 Anyhow, that's where we are. If you want to get  
8 together, folks, and try to find an individual TPP plaintiff  
9 and make a proposal to me at the next meeting, that would be  
10 great. If not, then, you know, I'll do the work and I'll find  
11 that and set that up for the first trial.

12 I think that leaves one more issue that were raised  
13 in the papers.

14 Judge Vanaskie, were you going to handle this or do  
15 you want me to handle this?

16 SPECIAL MASTER VANASKIE: Are you referring to the  
17 CVS matter?

18 THE COURT: Yes, sir.

19 SPECIAL MASTER VANASKIE: Yeah. That was up to you.  
20 If you want me to handle it, I'll be happy to handle it, but I  
21 wasn't sure.

22 THE COURT: If you want to do it, go ahead.

23 SPECIAL MASTER VANASKIE: Well --

24 THE COURT: Why don't do you it.

25 SPECIAL MASTER VANASKIE: Let's hear from counsel

1 then on CVS.

2 MR. KAPKE: Sure, Your Honor. I think this is an  
3 issue for the Court for both --

4 SPECIAL MASTER VANASKIE: Hold on.  
5 (Court reporter clarification.)

6 MS. KAPKE: Sure. This is Kara Kapke for CVS.

7 And we're here today again seeking clarity on the  
8 scope of the pleadings against CVS.

9 I want to make very clear that we're bringing this  
10 issue before the Court not in a premature effort to seek  
11 summary judgment. This is not a merits issue. This is not a  
12 substantive dispositive motion. But this is a procedural  
13 issue that has come up in the context of there being no  
14 plaintiffs left with medical monitoring claims against CVS.  
15 There are simply no plaintiffs who have pleaded claims against  
16 CVS in the medical monitoring complaint. There aren't any.

17 Three of the plaintiffs who initially named CVS have  
18 since dismissed their claims. Celeste Daring is the only  
19 non-dismissed plaintiff who mentions CVS in her individual  
20 paragraph in the medical monitoring complaint, but she's a  
21 Maryland resident and did not plead claims against CVS, did  
22 not plead a cause of action against CVS, because the only  
23 claims asserted against the pharmacy defendants and the  
24 operative medical monitoring complaint, breach of warranty and  
25 an independent medical monitoring cause of action were not

1 allowed under Maryland law under this Court's prior ruling.

2 So there's no Maryland claim against pharmacies. So  
3 Celeste Daring doesn't have any claims and hasn't pleaded any  
4 claims.

5 By the way, as an aside, for the first time ever,  
6 plaintiffs mention Robert Fields in their CMC statement,  
7 although they didn't quite explain why. And we were quite  
8 confused, because Robert Fields filled his valsartan scripts  
9 at ShopRite and Giant, not CVS.

10 But regardless, like Celeste Daring, Robert Fields is  
11 a Maryland resident. And Maryland residents don't have claims  
12 against pharmacy defendants.

13 So there are no plaintiffs with claims against CVS  
14 who actually named CVS in the paragraph where they discuss  
15 where they filled their prescriptions.

16 And likewise, again, later in the medical monitoring  
17 complaint, when plaintiffs specifically discuss CVS, they do  
18 not identify any plaintiffs with current claims against CVS.  
19 They identify the three plaintiffs who have since dismissed  
20 their claims against CVS. And they identify Daring, the  
21 Maryland resident who does not assert any causes of action  
22 against CVS.

23 And I don't think plaintiffs dispute any of that.  
24 Instead, they're grasping at straws and they're relying on an  
25 unasserted claim. And that's a claim belonging to Sarah Zher.

1 It's not asserted and it's not pleaded, and that's the issue  
2 that I think is really important here, is what's the scope of  
3 the pleadings.

4 In the paragraph of the medical monitoring complaint  
5 discussing Zher, plaintiffs identify ZHP as having  
6 manufactured the valsartan she took. They identify Aurobindo  
7 as having facilitated the regulatory approval of that ZHP  
8 product. They allege that at least some of the products --  
9 some of the ZHP product Zher purchased was purchased from ZHP  
10 by McKesson who in turn distributed this ZHP product to  
11 defendant Walmart and other retail pharmacy defendants.

12 That's it. That's all they say. There are no  
13 allegations relating to other manufacturers, no allegations  
14 relating to other wholesalers, no allegations relating to  
15 other pharmacies.

16 Plaintiffs are correct that CVS knew that Zher filled  
17 one 18-day script at CVS. Zher identified that script in her  
18 plaintiff fact sheet. She discussed it at her deposition.  
19 But that script was manufactured by Hetero as plaintiffs state  
20 on the fact sheet and as identified by the NDC code.

21 And I think it's interesting, in their position  
22 statement plaintiffs point to the language that a wholesaler  
23 sold this ZHP product to defendant Walmart among other retail  
24 pharmacy defendants as indicative that CVS was on notice of  
25 Zher's claims.

1 But that 18-day fill plaintiffs are talking about  
2 involves Hetero valsartan, not ZHP valsartan. CVS didn't  
3 prepare a DFS for Zher, a fact, by the way, that plaintiffs  
4 never complained about.

5 So at this point, I don't know what role, if any, a  
6 wholesaler played with respect to that 18-day fill, but it is  
7 completely illogical to suggest that because, according to  
8 plaintiffs, McKesson sold ZHP valsartan to Walmart and other  
9 retail defendants, that CVS knew that plaintiff had claims  
10 relating to a Hetero product that was filled at CVS.

11 The paragraphs in the complaint relate solely to ZHP  
12 and the stream relating to ZHP. It never mentions Hetero. It  
13 never mentions Camber. It has never mentioned CVS. And it's  
14 precisely because CVS knew that they're filled at CVS and  
15 plaintiffs didn't name it in the complaint that we were  
16 prejudiced here.

17 Were we supposed to call plaintiffs up and ask did  
18 they really mean to include CVS in the paragraphs about Zher?

19 We didn't because it was entirely logical to us that  
20 plaintiffs would not rely on the de minimis use of one 18-day  
21 fill to name CVS and Hetero and Camber in light of their own  
22 arguments regarding the lifetime cumulative threshold  
23 plaintiffs proposed in their complaint and attempted to  
24 establish through expert reports.

25 I don't want to get too much into the merits of the

1 LCT, but we would have asked questions of plaintiffs' experts,  
2 potentially hired our own experts just to discuss de minimis  
3 usage, and we would have breached the issue at class  
4 certification differently had we known that Zher was bringing  
5 claims against CVS.

6 And to give you just a brief overview of why this  
7 matters, remember here that we're talking about medical  
8 monitoring. The claims here are that the dose of valsartan  
9 with the NDMA impurity is sufficient to put a plaintiff at an  
10 increased risk of cancer. And to do that, plaintiffs  
11 themselves say you need to have taken a sufficient quantity of  
12 valsartan.

13 Zher filled one 18-day script of Hetero-manufactured  
14 valsartan at CVS. That comes nowhere close to the LCT that  
15 plaintiffs themselves proposed. To meet that LCT sufficient  
16 to warrant inclusion in the class according to the inclusion  
17 criteria proposed by plaintiffs, a plaintiff would have needed  
18 to take 32 months, nearly 1,000 days, of Hetero active  
19 ingredient. Zher took 18 days. That's less than 2 percent of  
20 the LCT plaintiffs themselves would have proposed as being  
21 sufficient to establish a lifetime cumulative exposure to  
22 valsartan. Or to put it another way, it's 54 times the amount  
23 of Hetero valsartan she filled from CVS needed to meet the  
24 LCT.

25 In contrast, plaintiffs have proposed an LCT



1 requiring only six month ZHP API at the dosage that Zher took.

2 Zher easily crossed the threshold for ZHP's API,  
3 having filled more than two years of valsartan with ZHP's API  
4 at Walmart.

5 That's presumably why they named ZHP/Walmart/McKesson  
6 in her paragraph in the complaint. Again, that's also why she  
7 didn't name CVS, didn't name Hetero, didn't name Camber.

8 You know, plaintiffs may have some substantive  
9 arguments about whether those 18 days of NDMA contribute  
10 enough to warrant inclusion in the medical monitoring as  
11 contrasted to the two years of ZHP valsartan Zher took, but  
12 that is not the issue here.

13 We didn't get to brief that issue. We didn't get to  
14 ask plaintiffs' experts questions about that issue. We didn't  
15 get to discuss it in our brief, at our depositions, because we  
16 didn't know plaintiffs were planning on relying on claims  
17 brought by Zher for CVS because they never pleaded them.

18 And I suspect this is not a one-off issue, Your  
19 Honor. And that further exacerbates the prejudice here.

20 Again, in their CMC statement for the first time,  
21 despite multiple efforts from me to meet and confer with  
22 plaintiffs about this, they again grasp at straws and mention  
23 Robert Fields.

24 Again, I mentioned earlier, Robert Fields did not  
25 fill at CVS, he filled at ShopRite and Giant. And in any

1 event, as a Maryland plaintiff, he has no claims against any  
2 pharmacy defendant.

3           The CVS Records Service Center did produce records  
4 from ShopRite to Marker, the third-party record collection  
5 agent in this litigation. But CVS never filled a DFS and  
6 never produced records as a defendant in the Fields  
7 litigation.

8           Even the Records Service Center records produced to  
9 Marker specifically referenced ShopRite. And the proof of use  
10 that Fields submitted with his PFS is a ShopRite bottle.

11           File buys are very common in the pharmacy industry,  
12 where records are transferred from one pharmacy to another.  
13 That's what occurred here. That's likely why plaintiffs never  
14 questioned why CVS did not fill out a DFS for Fields and why  
15 plaintiffs never mentioned Fields to me in my repeated  
16 requests for a meet and confer.

17           But just to give this a little bit more clarity, I  
18 looked at the paragraph mentioning Robert Fields specifically.

19           The complaint paragraph in the medical monitoring  
20 complaint specifically mentions ZHP API sold the United States  
21 with the assistance of Huahai, Teva, and Actavis. Those are  
22 the only defendants mentioned in that paragraph. CVS  
23 certainly is not mentioned in that paragraph.

24           But the Fields PFS references CVS as well as other  
25 APIs other than ZHP. So there's a discrepancy between the

1 fact sheet and the complaint.

2 But how is a defendant supposed to know that  
3 plaintiffs are pursuing claims against other entities  
4 mentioned in the fact sheet when there are very logical  
5 reasons why those defendants are not named in the Complaint?  
6 Maybe it's because of the de minimis issue with respect to a  
7 different API. Maybe it's because the fill was at ShopRite,  
8 not CVS. I don't know. But I do know that there is no way  
9 that I would know Robert Fields potentially intended to pursue  
10 a claim against CVS. I still don't know that. He's not.

11 I haven't gone through and compared every fact sheet  
12 to the complaint paragraph. And I don't think that's our  
13 burden. It's not something we should be doing. But I think  
14 plaintiffs are suggesting now that we and every other  
15 defendant should have done that.

16 Are we supposed to do that? How are we supposed to  
17 know if plaintiffs are targeting a defendant with respect to a  
18 plaintiff's claims if it is not mentioned in the complaint,  
19 especially when there are very real de minimis issues  
20 associated with the medical monitoring claims in light of the  
21 lifetime cumulative threshold that plaintiffs themselves  
22 proposed, and especially when plaintiffs have never explained  
23 how the LCT concept works in the combination of -- the context  
24 of a combination of active ingredients?

25 I think there are very serious due process issues

1 here, and that makes this issue one that goes well beyond  
2 Sarah Zher's individual claims because it relates to the scope  
3 of the complaint.

4 Is every defendant supposed to scour the PFS and  
5 deposition transcripts for every putative class representative  
6 for mention of that defendant and then reach out to plaintiff  
7 and say, did you really mean not to include us in the  
8 complaint paragraph about this plaintiff?

9 If there's an individual medical monitoring claim,  
10 even if the class actions for a limited subclass were remanded  
11 to its home court, how would defendants know if they were  
12 involved in that particular suit other than through the  
13 complaint reference?

14 We did not press plaintiffs' experts regarding the de  
15 minimis issue relating to the LCT because we were not  
16 mentioned in the complaint for plaintiffs like Sarah Zher.

17 So at bottom, if the plaintiffs are -- if the parties  
18 are intending to engage in settlement negotiations, how could  
19 they do so if they don't know which individual claims are  
20 brought against which defendants?

21 You know, I'm going to wrap this up and emphasize  
22 that this is not a dispositive motion issue. I'm not arguing  
23 the merits. I'm not trying to. But the defendants, CVS in  
24 particular, do need to know, indeed, we're entitled to know,  
25 which individuals plaintiffs are bringing claims against which

1 individual defendants and what remains of those claims.

2           It's not a merits issue but an issue about what  
3 claims are being asserted and the prejudice of what plaintiffs  
4 are trying to assert through functionally an amended complaint  
5 but not really an amended complaint and never seeking leave to  
6 amend.

7           That's a huge problem. There's real prejudice to the  
8 parties. And respectfully, Your Honor, we believe CVS is  
9 entitled to dismissal from the medical monitoring complaint.

10           SPECIAL MASTER VANASKIE: The end of your argument  
11 there certainly makes it sound like this is a dispositive  
12 motion issue.

13           But let's hear from -- who's addressing this issue  
14 for the plaintiffs?

15           MS. GEMAN: I am, Your Honor. Good morning. My name  
16 is Rachel Geman, and I am with Lief Cabraser Heimann &  
17 Bernstein speaking for the plaintiffs on this matter.

18           SPECIAL MASTER VANASKIE: Very well.

19           MS. GEMAN: Thank you.

20           Your Honor, I do agree essentially that CVS is  
21 seeking a rather drastic remedy of dismissal despite being on  
22 clear notice of claims against it and the absence of  
23 prejudice.

24           I would like, if I could, to begin with a couple of  
25 rather dispositive admissions made by Ms. Kapke.

1           She acknowledged both that she was on notice of  
2     claims against it, claims against CVS. And just to take a  
3     quick pause there, of course CVS has been in every complaint.  
4     We have pages of allegations about CVS in the operative  
5     complaint, including paragraphs 68 through 76, 488 through  
6     497.

7           But the point is, you know, they knew that there were  
8     claims. And she also acknowledged that Ms. Sarah Zher, a  
9     Florida rep who is entitled to bring an independent claim for  
10    medical monitoring, is indeed an adequate class rep in that  
11    she has met the threshold, meaning she took enough bad  
12    valsartan to be at, you know, a seriously enhanced risk.

13           So that almost could -- we could almost end with  
14    that, but I would like to address all the points if I could  
15    very briefly.

16           SPECIAL MASTER VANASKIE: Just briefly.

17           MS. GEMAN: I beg your pardon, sir?

18           SPECIAL MASTER VANASKIE: Briefly, please.

19           MS. GEMAN: Yeah, yeah. Okay.

20           So the bottom line is that, you know, CVS knew that  
21    Sarah Zher, as addressed in paragraph 13, took contaminated  
22    valsartan and that -- and she got some from CVS. CVS was at  
23    her deposition.

24           The quick background process was that we just -- as  
25    we honed the class definition, we agreed for certain other

1 plaintiffs that they wouldn't be class reps, but it doesn't  
2 mean for purposes of a complaint that they were, you know, not  
3 properly in the complaint or not properly noticed.

4 I want to speak about the prejudice. It seems that  
5 we're trying to combine or conflate notice issues with Rule 23  
6 issues.

7 The complaint and the class cert motion were  
8 100 percent clear that if some took a combination of  
9 valsartan, contaminated valsartan, it doesn't have to be one  
10 manufacturer, the point is, the relevance is if you have  
11 enough to be at the enhanced risk. So this notion that  
12 the so-called de minimis nature of her having taken CVS  
13 somehow detracts from the notice of the claim against them is  
14 without merit.

15 CVS -- none of the defendants opposed -- in their  
16 brief, CVS said we would have ask the expert questions and we  
17 would have challenged her adequacy.

18 First of all, none of the class cert defendants could  
19 or would have attacked the adequacy in our case.

20 If Your Honor looks at the class cert opp, they don't  
21 even mention Rule (a)(4), not at all, because these adequacies  
22 are relatively low threshold. These folks don't have  
23 conflicts and they took the medicine and their claims and it's  
24 tied up with typicality. There's no question that she's  
25 typical. The fact that she took a little or a lot via CVS

1 doesn't matter. The point is CVS was alleged to engage in the  
2 misconduct we've alleged, and we have at least one plaintiff  
3 that ties it to it. I don't believe there would have been a  
4 separate adequacy brief about this one plaintiff when this was  
5 not an argument for anyone else.

6           With respect to the experts, as you know, there  
7 was -- the experts spoke about the feasibility of a monitoring  
8 program and the pricing of it. Not one of them on either side  
9 went into specific issues about, you know, if somebody took  
10 like, you know, 80 percent to get them to the threshold of X  
11 and 20 percent of Y. It doesn't matter for what the experts  
12 did. It's irrelevant.

13           So, you know, respectfully, I don't think there's any  
14 prejudice here. I think the stated prejudice seems to be an  
15 after-the-fact attempt perhaps to inject new arguments that  
16 weren't in the record, even though there are plenty of class  
17 reps, not just Ms. Zher, who like Ms. Zher took, you know --  
18 essentially satisfied the class definition through long-term  
19 use of valsartan, which foreseeably means you might be at a  
20 couple different pharmacies, there might be a couple different  
21 APIs.

22           In short, we respectfully believe that the drastic  
23 remedy of dismissal is inappropriate given that we have this  
24 plaintiff.

25           You know, ideally would there be another clause or



1 sentence in paragraph 13, Sarah Zher, you know, also got  
2 valsartan from CVS? 100 percent. I regret that it's not  
3 there.

4 But it seems very tactical for CVS, which has been  
5 able to defend this case and has not been able to make any new  
6 arguments based on this fact, and taking the complaint as a  
7 whole, that they should be dismissed.

8 I'd be happy to answer any questions.

9 SPECIAL MASTER VANASKIE: All right. Let me ask a  
10 question.

11 MS. GEMAN: Uh-huh.

12 SPECIAL MASTER VANASKIE: Yes. I have one question,  
13 because your letter or the letter that was submitted for  
14 today's conference also mentions Robert Fields.

15 And do you concede that Mr. Fields is not a proper  
16 class representative for a medical monitoring claim against  
17 CVS?

18 MS. GEMAN: We do, only because of the business with  
19 the -- you know, being in Maryland against retailers. But we  
20 think he's relevant, though -- I mean, certainly he is an  
21 adequate class representative for -- you know, for other types  
22 of defendants. However --

23 SPECIAL MASTER VANASKIE: Not to CVS?

24 MS. GEMAN: But not against CVS.

25 But the point -- you know, I think we want to be

1 really -- especially given Ms. Kapke kept mentioning sort of  
2 due process. I mean, we just want to underscore that the  
3 extent to which CVS at large knows that there are claims  
4 against it in its capacity as a retailer and these claims are  
5 by both the independent monitoring class and the remedy class,  
6 and so there's just no surprise here. There's no surprise,  
7 there's no prejudice.

8 SPECIAL MASTER VANASKIE: Anything else on this issue  
9 on behalf of CVS?

10 MS. KAPKE: I just want to follow up and say the  
11 reason that the experts were not asked about the -- as  
12 Ms. Geman put it, the 80/20 percent de minimis issue is  
13 because it didn't come up in the complaint.

14 I would have asked those questions of the experts.  
15 We had several experts related to the LCT specifically, none  
16 of whom had claims against CVS where there was a CVS plaintiff  
17 who had less than 1 percent of the LCT compared to another  
18 fill. And that's what we're talking about.

19 There really is significant prejudice here, because  
20 there's not an issue -- the LCT issue and the de minimis issue  
21 was not teed up. We never got the opportunity to tee that up.

22 And I do think that there is a significant typicality  
23 and adequacy issue when you have a plaintiff who is going to  
24 have to litigate whether there is a de minimis issue.

25 Nobody has briefed that because it never came up with

1 any of the prior plaintiffs, because all of the prior  
2 plaintiffs have, at least with respect to CVS, had a  
3 significant enough chunk that the de minimis issue didn't  
4 arose.

5 But how are we supposed to know that if it's not in  
6 the complaint? The complaint has to mean something. And  
7 that's really the issue that I'm looking to get finality on is  
8 where -- what's the scope of the complaint, what's the scope  
9 of the claim, is it limited to the complaint or is it  
10 something broader than that? And if it's something broader  
11 than that, how are we supposed to know what that is?

12 SPECIAL MASTER VANASKIE: All right. Well, thank  
13 you.

14 MS. GEMAN: Your Honor, would you like me to respond  
15 or -- oh, okay.

16 SPECIAL MASTER VANASKIE: Go ahead, please. Briefly,  
17 please.

18 MS. GEMAN: I just want to -- you know, again, the  
19 class definition has always been clear and transparent that  
20 it's a combination of usage. This is not a surprise. There's  
21 other plaintiffs who had combinations of usages. It would  
22 have been entirely irrelevant and beyond the scope of our  
23 experts to opine on legal issues about an ascertainable class  
24 definition as distinct from other issues.

25 And finally, this is the first I'm hearing about

1 typicality for Ms. Zher. But again, her claims arise under  
2 the same facts, and they arise under the same legal and  
3 remedial theories. There is certainly nothing atypical about  
4 Ms. Zher who acquired, consumed dangerous amounts of  
5 contaminated medicine over many years. She's entirely  
6 typical, and there's no surprise to our class definition. And  
7 defendants indeed had plenty of opportunity to address that in  
8 their papers.

9 SPECIAL MASTER VANASKIE: All right. Very well.  
10 Thank you.

11 MS. GEMAN: Thank you.

12 SPECIAL MASTER VANASKIE: I would not order at this  
13 time that CVS -- that plaintiffs be directed to dismiss CVS  
14 from the medical monitoring complaint, nor do I think it's  
15 appropriate to grant leave to file a motion to dismiss on this  
16 ground. The matter has been presented now in a couple of  
17 letter briefs, and it's clear to me that there is standing on  
18 the part of Ms. Zher with respect to a claim against CVS.  
19 Whether that holds up in more of a summary judgment type  
20 proceeding, I'm not sure, but I don't think it's appropriate  
21 at this time to start ticking off individual claims against  
22 retail defendants based upon what has been disclosed or not  
23 disclosed in the complaint and in the fact sheets, the PFS or  
24 in discovery. I think enough has been presented here to at  
25 least have a colorable claim on behalf of Ms. Zher against

1 CVS.

2 All right. Anything else?

3 (No response.)

4 SPECIAL MASTER VANASKIE: Judge Kugler?

5 THE COURT: I'm here. I'm here.

6 SPECIAL MASTER VANASKIE: I don't know that we have  
7 anything else for today.

8 THE COURT: I think we're done.

9 MS. KAPKE: Your Honor --

10 THE COURT: Yes.

11 SPECIAL MASTER VANASKIE: Go ahead.

12 MS. KAPKE: I would just -- I think, you know,  
13 plaintiffs said that they would like to -- they wish they  
14 would have amended the complaint.

15 At some point, I think the complaint does need to be  
16 final. And I hear what you're saying, that you think that  
17 there's enough in the fact sheet.

18 I guess -- I think there should be an amended  
19 complaint here. At some point we have to rely on the  
20 complaint itself. And so I wonder what the next step is.  
21 When's the next claimant going to assert claims based on the  
22 fact sheet as opposed to the complaint? And I do have  
23 overarching concerns, not just about Sarah Zher, that the  
24 complaint is not final here. And I think that's a significant  
25 problem.

1           SPECIAL MASTER VANASKIE: I understand the concern  
2 that you're articulating, but complaints can be amended in a  
3 number of ways and even informally and even at trial.

4           I'm reluctant to open up pleadings. It seems to me  
5 that what has happened here is essentially the -- in the  
6 briefs that have been submitted to me, the letter briefs that  
7 have been submitted on this issue, the plaintiffs have  
8 essentially said that they're amending their complaint to  
9 identify Sarah Zher as a class representative for claims  
10 against CVS because she purchased contaminated valsartan at  
11 CVS. I think in effect you have that. But I can't go beyond  
12 that right now.

13           MS. KAPKE: So is this the last amended complaint  
14 that plaintiffs are -- are they going to continue to get  
15 opportunities to amend the complaint?

16           I think that's -- that's what we're searching for  
17 here, is a stop to plaintiffs amending the complaints  
18 informally.

19           You know, at some point we are entitled to know the  
20 scope of the claims. And that's what I'm trying to get  
21 through this procedural issue is some finality to what claims  
22 are being asserted.

23           And so I understand the Court's ruling with respect  
24 to Sarah Zher, but I think -- I think we need to figure out if  
25 there are any other unasserted, unpleaded claims.

1 I don't want this to come up with another plaintiff  
2 down the road that brings up claims against another defendant  
3 or other unasserted claims. At some point we have to have  
4 finality here.

5 SPECIAL MASTER VANASKIE: Well, I understand that you  
6 have to have finality, and I think you basically do have  
7 finality. You did raise an issue. And the plaintiffs did  
8 respond to say that you were on notice of the fact that Sarah  
9 Zher purchased contaminated or allegedly contaminated  
10 valsartan at CVS. I think it's fair.

11 MS. KAPKE: Thank you, Your Honor.

12 SPECIAL MASTER VANASKIE: I think that's all we can  
13 say on that.

14 Anything else?

15 Go ahead, Judge Kugler.

16 THE COURT: Is there anything else?

17 I just want to ask if anybody has any other issues  
18 they want to raise at this time with either of us.

19 MR. SLATER: Nothing I'm aware of for the plaintiffs,  
20 Your Honor.

21 MR. CARTWRIGHT: Your Honor, I may have one.

22 My name is Daniel Cartwright. I'm with Kenney  
23 Shelton Liptak Nowak and I represent the Tops defendants in  
24 the Vindigni matter. It originally came out of the Northern  
25 District of New York.

1 THE COURT: Okay.

2 MR. CARTWRIGHT: I just wanted to quickly raise  
3 similar issues to the one previous, but we were removed as a  
4 defendant in the amended complaint that the Vindignis put in  
5 in February. We were just looking for dismissal. I thought  
6 we were on for that today, but it appears we may not be. I  
7 just wanted to see how we could go about getting ourselves  
8 removed from this case and formally dismissed.

9 I believe we formally either made an application to  
10 the Court or requested it, and we were told it would come in  
11 the form of an order to show cause.

12 THE COURT: Well, I -- you have to bring me up to  
13 speed.

14 Why do you think you should be dismissed?

15 MR. CARTWRIGHT: We were removed as a defendant from  
16 the amended complaint.

17 THE COURT: What do you mean, you were removed as a  
18 defendant from? I don't understand what you're talking about,  
19 I'm sorry.

20 MR. CARTWRIGHT: We were not -- meaning that we were  
21 named as a defendant, Tops was named as a defendant in the  
22 original complaint. And then there was an amended complaint  
23 filed February 8, and we were removed as a defendant. We were  
24 not named.

25 THE COURT: You weren't included as a defendant in



1 the amended complaint. Correct?

2 MR. CARTWRIGHT: Correct.

3 THE COURT: So I don't understand what the issue is.  
4 If you're not a defendant, then you're not a defendant, are  
5 you?

6 MR. CARTWRIGHT: I believe we had either conferred  
7 with plaintiffs' counsel or with the Court about being  
8 formally removed from the multidistrict litigation. I believe  
9 we had to make some sort of appearance in order to be removed  
10 as a defendant. So I'm not sure either, so I'm raising the  
11 question.

12 If there's nothing to do, then great. But if there's  
13 any sort of application, petition, order to show cause or  
14 anything like that that we need to make, then I would just ask  
15 what that is so that we can do it and be formally dismissed.

16 THE COURT: Who represented the plaintiff in your  
17 case?

18 MR. CARTWRIGHT: It is represented by Robert Julian  
19 in Utica.

20 THE COURT: Have you talked to Mr. Julian in Utica  
21 about dismissal?

22 MR. CARTWRIGHT: Yes. And I believe in order to have  
23 us dismissed, it's sort of a blessing from the Court.

24 THE COURT: You could do a stipulation of dismissal  
25 from both sides. Just file a stipulation of dismissal signed

1 by plaintiffs' counsel and by you, and that's the end of it.

2 MR. CARTWRIGHT: Okay, great. We'll do that. Thank  
3 you, Judge.

4 THE COURT: Okay. Anything else?

5 (No response.)

6 THE COURT: All right. Thank you, everybody. We'll  
7 see you in a month if not sooner.

8 (Proceedings concluded at 11:08 a.m.)

9 - - -

10 I certify that the foregoing is a correct transcript  
11 from the record of proceedings in the above-entitled matter.

12

13 /S/ Ann Marie Mitchell, CCR, CRR, RDR, RMR  
14 Court Reporter/Transcriber

15 29th day of July, 2022  
16 Date

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<b>\$</b>	<b>32</b> [1] - 32:18 <b>3333</b> [1] - 2:10 <b>35215</b> [1] - 2:4	10:12, 34:21 <b>action</b> [5] - 9:7, 18:5, 28:22, 28:25, 29:21 <b>ACTION</b> [1] - 1:3 <b>actions</b> [1] - 36:10 <b>Actions</b> [1] - 13:2 <b>active</b> [2] - 32:18, 35:24 <b>actual</b> [1] - 23:17 <b>ADAM</b> [1] - 1:15 <b>Adam</b> [1] - 10:7 <b>add</b> [1] - 22:11 <b>additional</b> [1] - 11:11 <b>address</b> [2] - 38:14, 44:7 <b>addressed</b> [3] - 8:10, 8:12, 38:21 <b>addressing</b> [2] - 8:19, 37:13 <b>adequacies</b> [1] - 39:21 <b>adequacy</b> [4] - 39:17, 39:19, 40:4, 42:23 <b>adequate</b> [2] - 38:10, 41:21 <b>adjudicate</b> [1] - 10:3 <b>adjudicating</b> [1] - 8:25 <b>administrator</b> [1] - 6:13 <b>admissions</b> [1] - 37:25 <b>advance</b> [3] - 16:25, 18:14, 20:4 <b>adverse</b> [2] - 22:6, 22:7 <b>after-the-fact</b> [1] - 40:15 <b>agent</b> [1] - 34:5 <b>ago</b> [2] - 8:12, 11:25 <b>agree</b> [3] - 4:22, 16:6, 37:20 <b>agreed</b> [1] - 38:25 <b>ahead</b> [5] - 10:18, 27:22, 43:16, 45:11, 47:15 <b>Aid</b> [1] - 2:21 <b>aided</b> [1] - 1:25 <b>air</b> [1] - 22:17 <b>Alabama</b> [1] - 2:4 <b>aligned</b> [1] - 14:17 <b>alignment</b> [1] - 12:18 <b>allegations</b> [4] - 30:13, 30:14, 38:4 <b>allege</b> [1] - 30:8 <b>alleged</b> [3] - 13:24, 40:1, 40:2 <b>allegedly</b> [1] - 47:9 <b>allow</b> [1] - 19:21 <b>allowed</b> [1] - 29:1	<b>alluded</b> [1] - 21:13 <b>almost</b> [2] - 38:13 <b>ALSO</b> [1] - 3:1 <b>amend</b> [2] - 37:6, 46:15 <b>amended</b> [11] - 6:17, 37:4, 37:5, 45:14, 45:18, 46:2, 46:13, 48:4, 48:16, 48:22, 49:1 <b>amending</b> [2] - 46:8, 46:17 <b>amount</b> [1] - 32:22 <b>amounts</b> [1] - 44:4 <b>analogous</b> [2] - 13:23, 14:2 <b>analysis</b> [2] - 12:16, 14:7 <b>Anderson</b> [1] - 5:2 <b>Ann</b> [1] - 50:13 <b>ann</b> [1] - 1:22 <b>AnnMarie_Mitchell@</b> <b>njd.uscourts.gov</b> [1] - 1:22 <b>answer</b> [2] - 25:23, 41:8 <b>answered</b> [2] - 23:21 <b>antitrust</b> [3] - 13:14, 14:10, 23:1 <b>Antitrust</b> [1] - 13:20 <b>anyhow</b> [1] - 27:7 <b>anyway</b> [1] - 26:22 <b>API</b> [6] - 12:7, 33:1, 33:2, 33:3, 34:20, 35:7 <b>APIs</b> [2] - 34:25, 40:21 <b>appear</b> [1] - 5:6 <b>appearance</b> [1] - 49:9 <b>application</b> [2] - 48:9, 49:13 <b>apply</b> [1] - 12:16 <b>appreciate</b> [2] - 15:25, 19:2 <b>approach</b> [1] - 20:19 <b>appropriate</b> [3] - 6:18, 44:15, 44:20 <b>approval</b> [1] - 30:7 <b>April</b> [1] - 9:24 <b>arbitration</b> [1] - 13:13 <b>arguing</b> [1] - 36:22 <b>argument</b> [2] - 37:10, 40:5 <b>arguments</b> [5] - 17:20, 31:22, 33:9, 40:15, 41:6 <b>arise</b> [2] - 44:1, 44:2 <b>arising</b> [2] - 19:22, 19:23 <b>arose</b> [1] - 43:4 <b>articulated</b> [1] - 20:1	<b>articulating</b> [1] - 46:2 <b>ascertainable</b> [1] - 43:23 <b>aside</b> [4] - 17:8, 18:4, 22:18, 29:5 <b>assert</b> [3] - 29:21, 37:4, 45:21 <b>asserted</b> [4] - 28:23, 30:1, 37:3, 46:22 <b>assistance</b> [1] - 34:21 <b>associated</b> [1] - 35:20 <b>assumption</b> [1] - 16:18 <b>Atlanta</b> [1] - 2:11 <b>attached</b> [1] - 12:21 <b>attacked</b> [1] - 39:19 <b>attempt</b> [1] - 40:15 <b>attempted</b> [1] - 31:23 <b>attorney</b> [1] - 6:7 <b>atypical</b> [1] - 44:3 <b>Audrey</b> [1] - 7:11 <b>Aurobindo</b> [1] - 30:6 <b>authored</b> [1] - 13:1 <b>authorizations</b> [1] - 6:18 <b>avoid</b> [1] - 20:25 <b>aware</b> [2] - 11:9, 47:19
<b>/</b>	<b>4</b>			
<b>/S</b> [1] - 50:13	<b>4</b> [1] - 7:10 <b>4615</b> [1] - 2:23 <b>46204</b> [1] - 2:20 <b>48</b> [1] - 17:6 <b>488</b> [1] - 38:5 <b>497</b> [1] - 38:6 <b>4th</b> [1] - 1:7			
<b>0</b>				
<b>07068</b> [1] - 1:16 <b>08101</b> [1] - 1:8				
<b>1</b>	<b>5</b>			
<b>1</b> [2] - 7:5, 42:17 <b>1,000</b> [1] - 32:18 <b>10</b> [2] - 7:6, 17:6 <b>100</b> [2] - 39:8, 41:2 <b>1003</b> [1] - 2:7 <b>103</b> [1] - 1:16 <b>10:01</b> [2] - 1:9, 4:3 <b>11</b> [1] - 2:19 <b>1100</b> [1] - 1:19 <b>11:08</b> [1] - 50:8 <b>12</b> [4] - 4:17, 12:15, 17:5, 18:12 <b>13</b> [2] - 38:21, 41:1 <b>13087</b> [1] - 2:24 <b>1515</b> [1] - 1:19 <b>18</b> [2] - 32:19, 33:9 <b>18-day</b> [5] - 30:17, 31:1, 31:6, 31:20, 32:13 <b>19-cv-01070</b> [1] - 9:23 <b>19-md-02875</b> [1] - 1:4 <b>191032</b> [1] - 1:20 <b>1st</b> [2] - 16:5, 20:1	<b>5</b> [2] - 7:10, 13:3 <b>54</b> [1] - 32:22 <b>576-7018</b> [1] - 1:23			
	<b>6</b>			
	<b>6</b> [2] - 4:22, 7:11 <b>60</b> [1] - 11:11 <b>60601</b> [1] - 2:15 <b>68</b> [1] - 38:5			
	<b>7</b>			
	<b>7</b> [1] - 7:6 <b>76</b> [1] - 38:5 <b>77</b> [1] - 2:15			
	<b>8</b>			
	<b>8</b> [2] - 7:12, 48:23 <b>80</b> [1] - 40:10 <b>80/20</b> [1] - 42:12 <b>856</b> [1] - 1:23			
<b>2</b>	<b>9</b>			
<b>2</b> [3] - 5:21, 7:5, 32:19 <b>20</b> [1] - 40:11 <b>2018</b> [1] - 13:2 <b>2019</b> [1] - 9:24 <b>2022</b> [2] - 1:8, 50:15 <b>21</b> [1] - 7:22 <b>23</b> [3] - 10:5, 26:16, 39:5 <b>23(f)</b> [2] - 16:20, 18:21 <b>250</b> [1] - 2:7 <b>2500</b> [1] - 2:10 <b>28</b> [3] - 1:8, 11:13, 17:7 <b>29th</b> [1] - 50:15	<b>9</b> [1] - 7:13 <b>9617</b> [1] - 2:3 <b>990</b> [1] - 2:24			
	<b>A</b>			
	<b>a</b> (4 [1] - 39:21 <b>a.m</b> [3] - 1:9, 4:3, 50:8 <b>able</b> [2] - 41:5 <b>above-entitled</b> [1] - 50:11 <b>absence</b> [1] - 37:22 <b>absolutely</b> [1] - 14:20 <b>accordance</b> [1] - 16:4 <b>according</b> [2] - 31:7, 32:16 <b>acknowledged</b> [2] - 38:1, 38:8 <b>acquired</b> [1] - 44:4 <b>Actavis</b> [6] - 2:12, 2:12, 2:16, 2:17,			
<b>3</b>			<b>B</b>	
<b>3</b> [2] - 4:15, 7:9 <b>30</b> [1] - 6:22 <b>30305</b> [1] - 2:11 <b>3100</b> [1] - 2:15			<b>background</b> [1] - 38:24 <b>backwards</b> [1] - 16:2 <b>bad</b> [1] - 38:11 <b>bang</b> [1] - 15:16 <b>BARNES</b> [1] - 2:18 <b>based</b> [9] - 10:8, 12:2, 13:13, 13:14, 15:14, 25:24, 41:6, 44:22, 45:21 <b>basis</b> [1] - 25:17 <b>battle</b> [1] - 5:17 <b>beg</b> [1] - 38:17 <b>begin</b> [1] - 37:24 <b>begrudge</b> [1] - 19:4 <b>behalf</b> [6] - 6:5, 15:22, 19:15, 20:21, 42:9, 44:25 <b>bellwether</b> [4] - 24:4, 24:15, 24:18, 24:23 <b>belonging</b> [1] - 29:25 <b>Bernstein</b> [1] - 37:17 <b>BERNSTEIN</b> [1] - 2:6 <b>best</b> [7] - 9:18, 15:13, 20:14, 21:24, 22:8, 24:25, 27:4 <b>better</b> [1] - 27:6 <b>between</b> [3] - 7:16, 12:18, 34:25 <b>beyond</b> [3] - 36:1,	

<p>43:22, 46:11  <b>BI</b> [6] - 12:19, 14:15, 14:18, 15:6, 22:7, 24:23  <b>big</b> [2] - 25:5, 25:23  <b>biggest</b> [1] - 15:16  <b>billing</b> [2] - 5:15, 5:18  <b>Birmingham</b> [1] - 2:4  <b>bit</b> [3] - 8:14, 16:2, 34:17  <b>bite</b> [2] - 25:5, 25:8  <b>blessing</b> [1] - 49:23  <b>Blue</b> [2] - 13:19  <b>board</b> [1] - 4:4  <b>bodily</b> [1] - 12:12  <b>bottle</b> [1] - 34:10  <b>bottom</b> [2] - 36:17, 38:20  <b>Branch</b> [1] - 5:5  <b>breach</b> [1] - 28:24  <b>breached</b> [1] - 32:3  <b>Brian</b> [1] - 9:9  <b>brief</b> [6] - 12:22, 32:6, 33:13, 33:15, 39:16, 40:4  <b>briefed</b> [2] - 20:20, 42:25  <b>briefing</b> [2] - 11:3, 12:22  <b>briefly</b> [4] - 38:15, 38:16, 38:18, 43:16  <b>briefs</b> [3] - 44:17, 46:6  <b>bring</b> [3] - 20:23, 38:9, 48:12  <b>bringing</b> [3] - 28:9, 32:4, 36:25  <b>brings</b> [1] - 47:2  <b>broader</b> [2] - 43:10  <b>Brooks</b> [1] - 6:6  <b>brought</b> [3] - 10:17, 33:17, 36:20  <b>brought...or</b> [1] - 13:12  <b>buck</b> [1] - 15:16  <b>Building</b> [1] - 1:7  <b>burden</b> [1] - 35:13  <b>business</b> [2] - 22:16, 41:18  <b>buying</b> [1] - 23:6  <b>buys</b> [1] - 34:11</p>	<p><b>cancer</b> [1] - 32:10  <b>cannot</b> [2] - 17:4, 17:25  <b>capacity</b> [1] - 42:4  <b>Carrie</b> [1] - 7:6  <b>carried</b> [2] - 5:5, 7:7  <b>carry</b> [2] - 4:23, 6:12  <b>cart</b> [2] - 20:5, 20:10  <b>Cartwright</b> [1] - 47:22  <b>CARTWRIGHT</b> [10] - 2:23, 47:21, 48:2, 48:15, 48:20, 49:2, 49:6, 49:18, 49:22, 50:2  <b>CASE</b> [1] - 1:5  <b>case</b> [37] - 7:15, 7:18, 8:13, 8:19, 9:10, 9:13, 9:15, 9:25, 10:2, 10:24, 11:5, 11:8, 11:17, 11:18, 14:10, 14:24, 15:3, 15:7, 15:17, 16:11, 17:16, 18:6, 18:11, 20:20, 23:15, 23:17, 23:25, 24:6, 25:15, 26:5, 27:4, 39:19, 41:5, 48:8, 49:17  <b>Case</b> [1] - 11:13  <b>cases</b> [17] - 5:3, 7:1, 7:7, 8:8, 9:1, 13:7, 13:11, 13:14, 16:13, 16:15, 18:12, 19:7, 19:12, 19:14, 23:2, 24:4, 26:6  <b>causes</b> [1] - 29:21  <b>CCR</b> [1] - 50:13  <b>Celeste</b> [3] - 28:18, 29:3, 29:10  <b>Center</b> [7] - 12:23, 13:1, 13:6, 16:4, 22:25, 34:3, 34:8  <b>cert</b> [7] - 11:3, 12:22, 21:2, 22:17, 39:7, 39:18, 39:20  <b>certain</b> [3] - 7:23, 14:16, 38:25  <b>certainly</b> [14] - 10:16, 11:3, 15:25, 17:10, 17:16, 18:9, 19:4, 19:11, 19:17, 21:20, 34:23, 37:11, 41:20, 44:3  <b>certainty</b> [2] - 17:2, 17:24  <b>certification</b> [14] - 7:24, 15:11, 16:17, 16:19, 17:9, 18:23, 19:3, 20:7, 20:8, 20:21, 20:23, 24:12, 25:2, 32:4</p>	<p><b>certify</b> [4] - 10:3, 26:11, 26:17, 50:10  <b>certifying</b> [1] - 8:24  <b>challenge</b> [2] - 10:16, 10:20  <b>challenged</b> [1] - 39:17  <b>challenges</b> [1] - 13:8  <b>Chicago</b> [1] - 2:15  <b>choices</b> [1] - 12:19  <b>chunk</b> [1] - 43:3  <b>Circuit</b> [4] - 8:13, 18:22, 19:20, 20:9  <b>cited</b> [1] - 8:23  <b>cites</b> [1] - 13:19  <b>CIVIL</b> [1] - 1:3  <b>claim</b> [20] - 11:22, 19:13, 19:18, 20:7, 20:24, 24:7, 25:18, 26:10, 29:2, 29:25, 35:10, 36:9, 38:9, 39:13, 41:16, 43:9, 44:18, 44:25  <b>claimant</b> [1] - 45:21  <b>claims</b> [56] - 12:9, 12:10, 12:12, 12:18, 12:19, 13:11, 19:15, 19:19, 19:21, 20:22, 24:9, 24:11, 25:24, 28:14, 28:15, 28:18, 28:21, 28:23, 29:3, 29:4, 29:11, 29:13, 29:18, 29:20, 30:25, 31:9, 32:5, 32:8, 33:16, 34:1, 35:3, 35:18, 35:20, 36:2, 36:19, 36:25, 37:1, 37:3, 37:22, 38:2, 38:8, 39:23, 42:3, 42:4, 42:16, 44:1, 44:21, 45:21, 46:9, 46:20, 46:21, 46:25, 47:2, 47:3  <b>clarification</b> [1] - 28:5  <b>clarity</b> [2] - 28:7, 34:17  <b>class</b> [53] - 7:24, 12:2, 14:11, 14:17, 14:18, 15:1, 15:7, 15:10, 15:14, 16:16, 16:19, 17:9, 18:5, 18:23, 19:3, 19:8, 20:7, 20:8, 20:21, 20:22, 21:1, 21:21, 21:23, 22:9, 22:12, 24:12, 25:10, 25:17, 26:11, 26:17, 26:19, 32:3, 32:16, 36:5, 36:10, 38:10, 38:25, 39:1, 39:7, 39:18, 39:20, 40:16, 40:18, 41:16, 41:21, 42:5, 43:19,</p>	<p>43:23, 44:6, 46:9  <b>Class</b> [1] - 13:2  <b>class-wide</b> [1] - 25:17  <b>classes</b> [8] - 8:25, 10:3, 13:24, 16:22, 18:17, 21:12, 21:16, 25:3  <b>clause</b> [1] - 40:25  <b>cleanest</b> [2] - 15:14, 23:9  <b>clear</b> [6] - 16:9, 28:9, 37:22, 39:8, 43:19, 44:17  <b>clearly</b> [2] - 12:14, 22:25  <b>Clerk</b> [1] - 3:2  <b>clients</b> [1] - 22:7  <b>close</b> [1] - 32:14  <b>closer</b> [1] - 21:18  <b>CMC</b> [2] - 29:6, 33:20  <b>code</b> [1] - 30:20  <b>Cohen</b> [1] - 1:7  <b>collection</b> [1] - 34:4  <b>Collins</b> [1] - 7:6  <b>colorable</b> [1] - 44:25  <b>combination</b> [5] - 25:7, 35:23, 35:24, 39:8, 43:20  <b>combinations</b> [1] - 43:21  <b>combine</b> [1] - 39:5  <b>coming</b> [1] - 23:3  <b>Commencing</b> [1] - 1:9  <b>comments</b> [1] - 24:3  <b>common</b> [3] - 14:14, 15:6, 34:11  <b>compared</b> [2] - 35:11, 42:17  <b>complained</b> [2] - 11:20, 31:4  <b>complaining</b> [1] - 26:13  <b>complaint</b> [48] - 28:16, 28:20, 28:24, 29:17, 30:4, 31:11, 31:15, 31:23, 33:6, 34:19, 34:20, 35:1, 35:12, 35:18, 36:3, 36:8, 36:13, 36:16, 37:4, 37:5, 37:9, 38:3, 38:5, 39:2, 39:3, 39:7, 41:6, 42:13, 43:6, 43:8, 43:9, 44:14, 44:23, 45:14, 45:15, 45:19, 45:20, 45:22, 45:24, 46:8, 46:13, 46:15, 48:4, 48:16, 48:22, 49:1  <b>Complaint</b> [1] - 35:5  <b>complaints</b> [3] - 9:5,</p>	<p>46:2, 46:17  <b>complete</b> [1] - 11:3  <b>completely</b> [2] - 14:2, 31:7  <b>complexity</b> [1] - 13:17  <b>complicating</b> [1] - 18:19  <b>computer</b> [1] - 1:25  <b>computer-aided</b> [1] - 1:25  <b>concede</b> [1] - 41:15  <b>concept</b> [2] - 23:4, 35:23  <b>concern</b> [1] - 46:1  <b>concerned</b> [2] - 7:21, 26:9  <b>concerns</b> [1] - 45:23  <b>conclude</b> [1] - 14:19  <b>concluded</b> [1] - 50:8  <b>confer</b> [2] - 33:21, 34:16  <b>CONFERENCE</b> [1] - 1:5  <b>conference</b> [2] - 11:22, 41:14  <b>conferred</b> [2] - 11:10, 49:6  <b>conflate</b> [1] - 39:5  <b>conflicts</b> [1] - 39:23  <b>confused</b> [1] - 29:8  <b>conjecture</b> [1] - 18:25  <b>conjecturing</b> [1] - 18:24  <b>Connie</b> [1] - 7:5  <b>consider</b> [2] - 10:6, 15:5  <b>considerable</b> [1] - 12:15  <b>considering</b> [1] - 25:1  <b>consume</b> [1] - 22:5  <b>consumed</b> [1] - 44:4  <b>consumer</b> [17] - 8:24, 12:2, 12:9, 12:18, 14:5, 14:9, 14:17, 15:7, 15:13, 21:23, 22:8, 23:17, 25:9, 25:13, 25:15, 26:24  <b>consumers</b> [4] - 14:4, 21:25, 22:24, 23:5  <b>contaminated</b> [7] - 23:22, 38:21, 39:9, 44:5, 46:10, 47:9  <b>context</b> [2] - 28:13, 35:23  <b>continue</b> [3] - 23:25, 27:4, 46:14  <b>Continued</b> [1] - 2:1  <b>continues</b> [1] - 8:14  <b>contrast</b> [1] - 32:25  <b>contrasted</b> [1] - 33:11</p>
<b>C</b>				
<p><b>Cabraser</b> [1] - 37:16  <b>CABRASER</b> [1] - 2:6  <b>Cain</b> [1] - 7:6  <b>Callahan</b> [1] - 5:2  <b>Camber</b> [3] - 31:13, 31:21, 33:7  <b>Camden</b> [1] - 1:8</p>				

<p><b>contribute</b> [1] - 33:9  <b>controversy</b> [3] - 7:21, 19:13, 19:18  <b>conveyed</b> [1] - 11:7  <b>convinced</b> [1] - 26:22  <b>Cooper</b> [2] - 1:7, 5:10  <b>core</b> [1] - 5:16  <b>Corporation</b> [1] - 2:21  <b>correct</b> [7] - 4:19, 4:20, 9:22, 30:16, 49:1, 49:2, 50:10  <b>correctly</b> [1] - 11:7  <b>counsel</b> [4] - 8:12, 27:25, 49:7, 50:1  <b>couple</b> [4] - 37:24, 40:20, 44:16  <b>course</b> [2] - 18:17, 38:3  <b>Court</b> [5] - 1:22, 10:1, 17:10, 18:1, 50:13  <b>court</b> [4] - 9:6, 17:22, 28:5, 36:11  <b>COURT</b> [1] - 1:1  <b>Court's</b> [5] - 16:5, 17:13, 18:3, 29:1, 46:23  <b>Courthouse</b> [1] - 1:7  <b>Courtroom</b> [1] - 3:3  <b>courts</b> [1] - 9:2  <b>created</b> [2] - 22:6, 22:7  <b>creativity</b> [2] - 13:8, 16:3  <b>criteria</b> [1] - 32:17  <b>Cross</b> [1] - 13:19  <b>crossed</b> [1] - 33:2  <b>CRR</b> [2] - 1:22, 50:13  <b>cumulative</b> [3] - 31:22, 32:21, 35:21  <b>current</b> [1] - 29:18  <b>cut</b> [1] - 24:9  <b>CVS</b> [73] - 2:20, 27:17, 28:1, 28:6, 28:8, 28:14, 28:16, 28:17, 28:19, 28:21, 28:22, 29:9, 29:13, 29:14, 29:17, 29:18, 29:20, 29:22, 30:16, 30:17, 30:24, 31:2, 31:9, 31:10, 31:13, 31:14, 31:18, 31:21, 32:5, 32:14, 32:23, 33:7, 33:17, 33:25, 34:3, 34:5, 34:14, 34:22, 34:24, 35:8, 35:10, 36:23, 37:8, 37:20, 38:2, 38:3, 38:4, 38:20, 38:22, 39:12, 39:15, 39:16, 39:25, 40:1, 41:2, 41:4,</p>	<p>41:17, 41:23, 41:24, 42:3, 42:9, 42:16, 43:2, 44:13, 44:18, 45:1, 46:10, 46:11, 47:10</p> <p style="text-align: center;"><b>D</b></p> <p><b>D-A-I-S</b> [1] - 5:21  <b>Dais</b> [1] - 5:21  <b>damages</b> [1] - 22:19  <b>dandy</b> [1] - 4:7  <b>dangerous</b> [1] - 44:4  <b>Daniel</b> [1] - 47:22  <b>DANIEL</b> [1] - 2:23  <b>dare</b> [1] - 15:8  <b>Daring</b> [4] - 28:18, 29:3, 29:10, 29:20  <b>Date</b> [1] - 50:15  <b>Davis</b> [1] - 4:23  <b>days</b> [6] - 6:22, 8:12, 11:11, 32:18, 32:19, 33:9  <b>de</b> [10] - 31:20, 32:2, 35:6, 35:19, 36:14, 39:12, 42:12, 42:20, 42:24, 43:3  <b>Debra</b> [1] - 7:9  <b>decide</b> [1] - 19:9  <b>decides</b> [1] - 15:8  <b>declined</b> [1] - 17:14  <b>defend</b> [1] - 41:5  <b>defendant</b> [24] - 9:24, 11:23, 19:23, 23:17, 30:11, 30:23, 34:2, 34:6, 35:2, 35:15, 35:17, 36:4, 36:6, 47:2, 48:4, 48:15, 48:18, 48:21, 48:23, 48:25, 49:4, 49:10  <b>Defendant</b> [1] - 2:24  <b>Defendants</b> [3] - 2:11, 2:16, 2:20  <b>defendants</b> [37] - 7:17, 8:7, 8:23, 10:8, 10:14, 11:10, 11:12, 11:18, 12:3, 12:7, 13:15, 15:5, 15:23, 17:12, 17:19, 20:24, 21:5, 26:9, 26:13, 28:23, 29:12, 30:11, 30:24, 31:9, 34:22, 35:5, 36:11, 36:20, 36:23, 37:1, 39:15, 39:18, 41:22, 44:7, 44:22, 47:23  <b>defense</b> [5] - 4:14, 4:16, 7:2, 7:19, 8:12  <b>deficiency</b> [1] - 5:16  <b>define</b> [1] - 16:21</p>	<p><b>definition</b> [5] - 38:25, 40:18, 43:19, 43:24, 44:6  <b>denies</b> [1] - 18:23  <b>Dennis</b> [1] - 5:21  <b>deposition</b> [3] - 30:18, 36:5, 38:23  <b>depositions</b> [1] - 33:15  <b>Deputy</b> [1] - 3:3  <b>Dequeant</b> [1] - 7:11  <b>DEQUEANT</b> [1] - 7:12  <b>desires</b> [1] - 14:21  <b>desk</b> [1] - 21:17  <b>despite</b> [2] - 33:21, 37:21  <b>determine</b> [1] - 22:2  <b>detracts</b> [1] - 39:13  <b>DFS</b> [3] - 31:3, 34:5, 34:14  <b>dice</b> [1] - 25:17  <b>difference</b> [1] - 14:7  <b>different</b> [5] - 18:20, 18:24, 35:7, 40:20  <b>differently</b> [1] - 32:4  <b>difficult</b> [1] - 8:4  <b>direct</b> [11] - 9:16, 9:17, 13:23, 14:3, 14:5, 14:9, 17:22, 21:25, 22:24, 23:2, 25:13  <b>directed</b> [1] - 44:13  <b>direction</b> [3] - 11:5, 18:24, 25:9  <b>directions</b> [1] - 18:20  <b>directly</b> [2] - 11:7, 26:12  <b>directs</b> [1] - 15:10  <b>disagreements</b> [1] - 17:2  <b>disclosed</b> [2] - 44:22, 44:23  <b>discovery</b> [2] - 13:5, 44:24  <b>discrepancy</b> [1] - 34:25  <b>discrete</b> [1] - 20:3  <b>discuss</b> [4] - 29:14, 29:17, 32:2, 33:15  <b>discussed</b> [2] - 7:20, 30:18  <b>discussing</b> [1] - 30:5  <b>discussion</b> [1] - 11:2  <b>dismiss</b> [3] - 4:18, 44:13, 44:15  <b>dismissal</b> [8] - 6:1, 37:9, 37:21, 40:23, 48:5, 49:21, 49:24, 49:25  <b>dismissed</b> [9] - 5:3, 28:18, 28:19, 29:19,</p>	<p>41:7, 48:8, 48:14, 49:15, 49:23  <b>dispose</b> [1] - 24:11  <b>disposition</b> [1] - 21:18  <b>dispositive</b> [14] - 10:17, 10:22, 11:6, 11:15, 11:20, 12:14, 14:12, 15:15, 21:14, 21:17, 28:12, 36:22, 37:11, 37:25  <b>dispute</b> [2] - 7:16, 29:23  <b>distant</b> [1] - 8:3  <b>distinct</b> [1] - 43:24  <b>distributed</b> [1] - 30:10  <b>District</b> [2] - 9:6, 47:25  <b>DISTRICT</b> [3] - 1:1, 1:1, 1:11  <b>divided</b> [1] - 13:24  <b>docketed</b> [1] - 11:14  <b>doctrine</b> [1] - 7:22  <b>done</b> [11] - 12:17, 14:23, 16:25, 19:6, 25:20, 26:20, 26:21, 27:3, 35:15, 45:8  <b>dosage</b> [1] - 33:1  <b>dose</b> [1] - 32:8  <b>down</b> [3] - 15:15, 26:5, 47:2  <b>drastic</b> [2] - 37:21, 40:22  <b>Drive</b> [1] - 2:15  <b>drug</b> [1] - 22:5  <b>due</b> [5] - 16:1, 21:5, 24:19, 35:25, 42:2  <b>during</b> [1] - 21:16</p> <p style="text-align: center;"><b>E</b></p> <p><b>easiest</b> [1] - 23:24  <b>easily</b> [1] - 33:2  <b>easy</b> [1] - 4:10  <b>economic</b> [13] - 11:16, 12:18, 14:15, 14:17, 15:6, 16:6, 16:13, 18:6, 22:8, 22:12, 25:10, 25:17, 25:24  <b>effect</b> [4] - 22:6, 22:7, 25:16, 46:11  <b>effectively</b> [1] - 24:17  <b>efficiency</b> [1] - 12:20  <b>efficient</b> [1] - 23:9  <b>effort</b> [2] - 20:14, 28:10  <b>efforts</b> [1] - 33:21  <b>Eighth</b> [1] - 2:7  <b>Eisenhower</b> [1] - 1:16  <b>either</b> [9] - 17:22, 20:22, 21:9, 26:15, 40:8, 47:18, 48:9,</p>	<p>49:6, 49:10  <b>Elganam</b> [1] - 7:12  <b>ELGANAM</b> [1] - 7:12  <b>Elie</b> [1] - 6:2  <b>ELIE</b> [1] - 6:2  <b>emphasize</b> [2] - 21:8, 36:21  <b>enable</b> [1] - 19:8  <b>encompass</b> [1] - 14:13  <b>encompasses</b> [1] - 15:5  <b>end</b> [4] - 26:5, 37:10, 38:13, 50:1  <b>endeavoring</b> [1] - 26:19  <b>engage</b> [2] - 36:18, 40:1  <b>engender</b> [1] - 14:13  <b>engendering</b> [1] - 24:6  <b>enhanced</b> [2] - 38:12, 39:11  <b>enjoying</b> [1] - 4:7  <b>entered</b> [1] - 20:6  <b>entering</b> [1] - 5:14  <b>entire</b> [4] - 7:21, 19:12, 19:17, 23:11  <b>entirely</b> [5] - 14:16, 22:3, 31:19, 43:22, 44:5  <b>entities</b> [1] - 35:3  <b>entitled</b> [6] - 21:2, 36:24, 37:9, 38:9, 46:19, 50:11  <b>errors</b> [1] - 6:18  <b>Erskine</b> [1] - 6:14  <b>especially</b> [3] - 35:19, 35:22, 42:1  <b>ESQUIRE</b> [9] - 1:15, 1:19, 2:3, 2:6, 2:10, 2:14, 2:19, 2:23, 3:2  <b>essentially</b> [5] - 21:25, 37:20, 40:18, 46:5, 46:8  <b>establish</b> [2] - 31:24, 32:21  <b>estate</b> [4] - 5:10, 6:7, 6:8, 6:14  <b>event</b> [4] - 10:2, 19:23, 21:6, 34:1  <b>exacerbates</b> [1] - 33:19  <b>exact</b> [1] - 14:9  <b>example</b> [5] - 13:19, 14:1, 15:8, 24:14, 25:8  <b>excellent</b> [1] - 13:1  <b>excess</b> [1] - 22:19  <b>exchange</b> [1] - 11:15</p>
---	---	--	--	---

<b>exercised</b> [1] - 16:3 <b>exhibit</b> [1] - 12:22 <b>exist</b> [1] - 26:14 <b>expert</b> [4] - 11:6, 11:15, 31:24, 39:16 <b>experts</b> [11] - 32:1, 32:2, 33:14, 36:14, 40:6, 40:7, 40:11, 42:11, 42:14, 42:15, 43:23 <b>explain</b> [1] - 29:7 <b>explained</b> [1] - 35:22 <b>expose</b> [1] - 23:10 <b>exposure</b> [1] - 32:21 <b>express</b> [1] - 22:13 <b>expressed</b> [1] - 12:3 <b>expression</b> [1] - 11:19 <b>expressly</b> [1] - 17:17 <b>extant</b> [1] - 10:2 <b>extent</b> [2] - 10:15, 42:3	48:23 <b>filing</b> [3] - 9:16, 9:17, 13:12 <b>fill</b> [7] - 31:1, 31:6, 31:21, 33:25, 34:14, 35:7, 42:18 <b>filled</b> [10] - 29:8, 29:15, 30:16, 31:10, 31:14, 32:13, 32:23, 33:3, 33:25, 34:5 <b>final</b> [5] - 21:15, 23:14, 27:5, 45:16, 45:24 <b>finality</b> [5] - 43:7, 46:21, 47:4, 47:6, 47:7 <b>finally</b> [1] - 43:25 <b>fine</b> [1] - 15:9 <b>Fine</b> [1] - 4:7 <b>firm</b> [2] - 5:11, 5:22 <b>first</b> [18] - 12:2, 12:4, 15:7, 15:9, 15:10, 16:6, 16:10, 20:15, 21:21, 22:22, 25:23, 26:25, 27:11, 29:5, 33:20, 39:18, 43:25 <b>Fischer</b> [1] - 8:13 <b>five</b> [2] - 4:23, 5:8 <b>fix</b> [1] - 6:17 <b>flexibility</b> [1] - 14:22 <b>Floor</b> [1] - 2:7 <b>Florida</b> [1] - 38:9 <b>FLSA</b> [1] - 8:13 <b>focus</b> [2] - 16:12, 18:5 <b>folks</b> [4] - 8:1, 27:3, 27:8, 39:22 <b>follow</b> [1] - 42:10 <b>followed</b> [1] - 21:16 <b>foregoing</b> [1] - 50:10 <b>foreign</b> [1] - 17:19 <b>foreseeably</b> [1] - 40:19 <b>form</b> [2] - 14:4, 48:11 <b>formally</b> [4] - 48:8, 48:9, 49:8, 49:15 <b>forth</b> [1] - 15:1 <b>forthcoming</b> [1] - 16:16 <b>forward</b> [4] - 4:24, 7:7, 15:17, 16:15 <b>four</b> [2] - 5:8, 10:15 <b>frame</b> [1] - 11:2 <b>framed</b> [1] - 8:23 <b>Frances</b> [1] - 7:6 <b>Frank</b> [1] - 7:10 <b>frankly</b> [2] - 23:9, 26:14 <b>fraud</b> [1] - 25:22 <b>FREEMAN</b> [1] - 1:15 <b>front</b> [1] - 10:18 <b>full</b> [1] - 26:16	<b>fully</b> [1] - 20:20 <b>functionally</b> [1] - 37:4 <b>futile</b> [1] - 18:22 <b>future</b> [3] - 8:3, 11:17, 18:17  <b>G</b> <b>G-R-E-E-N-E</b> [1] - 6:2 <b>game</b> [2] - 22:12, 23:10 <b>GEMAN</b> [11] - 2:6, 37:15, 37:19, 38:17, 38:19, 41:11, 41:18, 41:24, 43:14, 43:18, 44:11 <b>Geman</b> [2] - 37:16, 42:12 <b>general</b> [1] - 17:13 <b>generis</b> [1] - 14:17 <b>Georgia</b> [1] - 2:11 <b>Gerald</b> [1] - 6:6 <b>Giant</b> [2] - 29:9, 33:25 <b>given</b> [3] - 20:9, 40:23, 42:1 <b>globally</b> [1] - 23:11 <b>goal</b> [3] - 16:11, 16:12, 19:24 <b>grant</b> [1] - 44:15 <b>granting</b> [1] - 7:23 <b>grasp</b> [1] - 33:22 <b>grasping</b> [1] - 29:24 <b>great</b> [4] - 15:24, 27:10, 49:12, 50:2 <b>greatest</b> [5] - 12:20, 14:14, 22:1, 22:9, 22:22 <b>GREENBERG</b> [2] - 2:9, 2:14 <b>Greenberg</b> [1] - 4:13 <b>Greene</b> [1] - 6:2 <b>Greg</b> [2] - 15:21, 26:1 <b>GREGORY</b> [1] - 2:14 <b>ground</b> [1] - 44:16 <b>Group</b> [1] - 6:3 <b>GROUP</b> [1] - 2:2 <b>group</b> [3] - 4:14, 13:4, 25:17 <b>grouped</b> [3] - 13:12, 13:14, 22:15 <b>grouping</b> [5] - 12:1, 12:19, 13:17, 14:21, 25:7 <b>groupings</b> [1] - 9:5 <b>groups</b> [1] - 22:14 <b>guess</b> [3] - 16:22, 18:25, 45:18 <b>guidance</b> [8] - 12:23, 13:6, 13:16, 15:2, 16:4, 16:5, 18:15,	22:25  <b>H</b> <b>half</b> [3] - 4:18, 11:2 <b>hand</b> [1] - 14:6 <b>handed</b> [1] - 22:4 <b>handle</b> [4] - 27:14, 27:15, 27:20 <b>happy</b> [3] - 25:8, 27:20, 41:8 <b>hard</b> [1] - 19:3 <b>Harkins</b> [7] - 4:10, 4:11, 4:13, 6:12, 6:23, 7:2, 7:3 <b>HARKINS</b> [4] - 2:10, 4:12, 4:20, 7:4 <b>head</b> [1] - 27:4 <b>health</b> [3] - 6:19, 22:6, 22:7 <b>hear</b> [5] - 17:14, 17:16, 27:25, 37:13, 45:16 <b>heard</b> [3] - 17:20, 26:16, 26:19 <b>hearing</b> [3] - 16:5, 20:1, 43:25 <b>heart</b> [2] - 16:5, 24:3 <b>Heimann</b> [1] - 37:16 <b>HEIMANN</b> [1] - 2:6 <b>held</b> [1] - 4:1 <b>Hetero</b> [11] - 15:9, 25:8, 30:19, 31:2, 31:10, 31:12, 31:21, 32:13, 32:18, 32:23, 33:7 <b>Hetero-</b> <b>manufactured</b> [1] - 32:13 <b>hired</b> [2] - 6:7, 32:2 <b>Hold</b> [1] - 28:4 <b>holds</b> [1] - 44:19 <b>home</b> [1] - 36:11 <b>honed</b> [1] - 38:25 <b>honest</b> [4] - 23:15, 23:25, 26:2, 27:6 <b>Honik</b> [3] - 8:19, 17:24, 20:13 <b>HONIK</b> [12] - 1:18, 1:19, 8:18, 8:22, 9:18, 9:21, 10:10, 11:1, 20:18, 24:2, 25:16, 26:7 <b>Honik's</b> [2] - 16:1, 17:1 <b>honoring</b> [1] - 25:1 <b>Honor</b> [39] - 4:12, 4:20, 5:13, 7:4, 8:18, 8:22, 10:7, 15:21, 15:25, 16:14, 17:11,	17:14, 18:4, 18:7, 18:23, 19:11, 19:12, 19:17, 19:24, 19:25, 20:6, 20:8, 20:18, 21:20, 22:4, 24:2, 26:1, 28:2, 33:19, 37:8, 37:15, 37:20, 39:20, 43:14, 45:9, 47:11, 47:20, 47:21 <b>Honorable</b> [2] - 3:2, 4:1 <b>HONORABLE</b> [1] - 1:10 <b>hope</b> [3] - 8:2, 11:16, 15:4 <b>hopefully</b> [1] - 24:8 <b>horse</b> [2] - 20:5, 20:11 <b>Huahai</b> [2] - 10:12, 34:21 <b>Hudson</b> [1] - 2:7 <b>huge</b> [1] - 37:7 <b>hundreds</b> [1] - 18:20 <b>hypothetical</b> [1] - 24:22  <b>I</b> <b>ideally</b> [1] - 40:25 <b>identical</b> [1] - 22:15 <b>identified</b> [2] - 30:17, 30:20 <b>identify</b> [7] - 18:6, 29:18, 29:19, 29:20, 30:5, 30:6, 46:9 <b>Illinois</b> [1] - 2:15 <b>illogical</b> [1] - 31:7 <b>illustrations</b> [1] - 13:16 <b>implicate</b> [5] - 12:11, 12:12, 14:13, 22:1, 22:22 <b>implicated</b> [1] - 9:14 <b>implicates</b> [4] - 8:9, 20:16, 22:9, 26:12 <b>implied</b> [2] - 12:2, 22:14 <b>implore</b> [1] - 15:4 <b>important</b> [2] - 9:3, 30:2 <b>impurity</b> [1] - 32:9 <b>inappropriate</b> [1] - 40:23 <b>Inc</b> [5] - 2:12, 2:12, 2:16, 2:17, 2:20 <b>include</b> [2] - 31:18, 36:7 <b>included</b> [1] - 48:25 <b>including</b> [2] - 22:23, 38:5 <b>inclusion</b> [3] - 32:16,
---	--	---	--	---



33:10 <b>inconsistent</b> [1] - 18:3 <b>increased</b> [2] - 22:6, 32:10 <b>indeed</b> [3] - 36:24, 38:10, 44:7 <b>independent</b> [4] - 9:16, 28:25, 38:9, 42:5 <b>Indiana</b> [1] - 2:20 <b>Indianapolis</b> [1] - 2:20 <b>indicated</b> [3] - 16:9, 16:24, 17:8 <b>indicative</b> [1] - 30:24 <b>indirect</b> [3] - 13:23, 14:2, 23:2 <b>individual</b> [14] - 19:21, 20:22, 24:7, 24:10, 26:5, 26:10, 26:25, 27:8, 28:19, 36:2, 36:9, 36:19, 37:1, 44:21 <b>individualized</b> [2] - 24:13, 25:11 <b>individuals</b> [1] - 36:25 <b>Industries</b> [2] - 2:11, 2:16 <b>industry</b> [1] - 34:11 <b>inform</b> [1] - 18:16 <b>informally</b> [2] - 46:3, 46:18 <b>informative</b> [1] - 21:14 <b>ingredient</b> [1] - 32:19 <b>ingredients</b> [1] - 35:24 <b>initial</b> [1] - 14:11 <b>inject</b> [1] - 40:15 <b>Injury</b> [1] - 6:3 <b>injury</b> [2] - 12:12, 24:4 <b>INJURY</b> [1] - 2:2 <b>instead</b> [1] - 29:24 <b>instructive</b> [1] - 13:20 <b>intended</b> [1] - 35:9 <b>intending</b> [1] - 36:18 <b>interesting</b> [1] - 30:21 <b>intervention</b> [6] - 7:25, 19:1, 19:7, 20:24, 26:8, 26:12 <b>involved</b> [2] - 19:10, 36:12 <b>involves</b> [5] - 17:5, 17:6, 17:7, 24:19, 31:2 <b>ironically</b> [1] - 20:24 <b>irrelevant</b> [2] - 40:12, 43:22 <b>irrespective</b> [1] - 16:16 <b>isolated</b> [3] - 24:6, 24:18, 26:10 <b>issue</b> [45] - 7:24, 8:4,	8:10, 8:11, 8:15, 8:22, 14:25, 15:22, 19:13, 19:18, 24:12, 25:22, 27:12, 28:3, 28:10, 28:11, 28:13, 30:1, 32:3, 33:12, 33:13, 33:14, 33:18, 35:6, 36:1, 36:15, 36:22, 37:2, 37:12, 37:13, 42:8, 42:12, 42:20, 42:23, 42:24, 43:3, 43:7, 46:7, 46:21, 47:7, 49:3 <b>issues</b> [30] - 4:8, 7:16, 7:19, 8:19, 12:12, 14:14, 15:3, 17:12, 17:17, 21:18, 21:25, 22:1, 22:10, 22:23, 23:8, 23:14, 24:8, 24:19, 25:10, 25:11, 35:19, 35:25, 39:5, 39:6, 40:9, 43:23, 43:24, 47:17, 48:3 <b>itself</b> [2] - 12:25, 45:20	<b>jurisdiction</b> [12] - 8:11, 9:7, 10:11, 10:16, 10:19, 10:20, 10:23, 17:11, 17:13, 17:15, 17:17, 17:20 <b>jurisdictions</b> [1] - 17:7 <b>jury</b> [1] - 25:21 <b>Juul</b> [1] - 14:24	<b>left</b> [1] - 28:14 <b>legal</b> [7] - 12:11, 14:14, 15:16, 21:24, 22:23, 43:23, 44:2 <b>less</b> [2] - 32:19, 42:17 <b>letter</b> [6] - 4:16, 15:18, 41:13, 44:17, 46:6 <b>Levin</b> [1] - 5:10 <b>Lexecon</b> [7] - 8:5, 8:9, 8:17, 8:21, 9:13, 17:12, 17:23 <b>LIABILITY</b> [1] - 1:4 <b>liberty</b> [1] - 14:25 <b>Lieff</b> [1] - 37:16 <b>LIEFF</b> [1] - 2:6 <b>lifetime</b> [3] - 31:22, 32:21, 35:21 <b>light</b> [3] - 12:15, 31:21, 35:20 <b>likely</b> [3] - 16:15, 21:15, 34:13 <b>likewise</b> [1] - 29:16 <b>limine</b> [1] - 21:19 <b>limited</b> [2] - 36:10, 43:9 <b>line</b> [2] - 12:24, 38:20 <b>LIPTAK</b> [1] - 2:22 <b>Liptak</b> [1] - 47:23 <b>list</b> [3] - 5:7, 6:23, 7:14 <b>listed</b> [4] - 5:8, 5:20, 5:25, 7:2 <b>listing</b> [1] - 7:14 <b>litigate</b> [1] - 42:24 <b>Litigation</b> [2] - 13:3, 13:20 <b>litigation</b> [11] - 10:15, 12:8, 13:18, 13:21, 18:15, 20:4, 23:12, 24:24, 34:5, 34:7, 49:8 <b>LITIGATION</b> [1] - 1:4 <b>LLC</b> [4] - 1:15, 1:18, 2:12, 2:16 <b>LLP</b> [4] - 2:9, 2:14, 2:18, 2:22 <b>logical</b> [2] - 31:19, 35:4 <b>long-term</b> [1] - 40:18 <b>look</b> [3] - 4:8, 12:25, 25:22 <b>looked</b> [1] - 34:18 <b>looking</b> [2] - 43:7, 48:5 <b>looks</b> [1] - 39:20 <b>LORETTA</b> [1] - 3:2 <b>lose</b> [7] - 24:10, 24:22, 25:14, 25:23, 26:3, 26:4 <b>losing</b> [1] - 24:23 <b>loss</b> [3] - 16:6, 16:13,	18:6 <b>lost</b> [1] - 25:18 <b>low</b> [1] - 39:22 <b>Ltd</b> [2] - 2:11, 2:16
<b>M</b>				
<b>MacStravic</b> [1] - 3:3 <b>MADA</b> [5] - 21:1, 24:10, 24:14, 24:22, 26:15 <b>MADA's</b> [3] - 20:22, 21:5, 24:7 <b>maintain</b> [1] - 21:6 <b>major</b> [1] - 15:5 <b>Management</b> [1] - 11:13 <b>MANAGEMENT</b> [1] - 1:5 <b>management</b> [5] - 7:15, 8:19, 11:5, 11:18, 12:1 <b>Managing</b> [1] - 13:2 <b>manufactured</b> [3] - 30:6, 30:19, 32:13 <b>manufacturer</b> [1] - 39:10 <b>manufacturers</b> [1] - 30:13 <b>Marie</b> [2] - 1:22, 50:13 <b>Marjorie</b> [1] - 6:13 <b>Marker</b> [2] - 34:4, 34:9 <b>market</b> [1] - 13:25 <b>Market</b> [1] - 1:19 <b>Maryland</b> [8] - 28:21, 29:1, 29:2, 29:11, 29:21, 34:1, 41:19 <b>MASTER</b> [26] - 1:12, 4:2, 4:5, 27:16, 27:19, 27:23, 27:25, 28:4, 37:10, 37:18, 38:16, 38:18, 41:9, 41:12, 41:23, 42:8, 43:12, 43:16, 44:9, 44:12, 45:4, 45:6, 45:11, 46:1, 47:5, 47:12 <b>materially</b> [1] - 20:3 <b>matter</b> [10] - 5:12, 5:23, 24:20, 27:17, 37:17, 40:1, 40:11, 44:16, 47:24, 50:11 <b>matters</b> [2] - 5:5, 32:7 <b>MAZIE</b> [1] - 1:15 <b>McKesson</b> [2] - 30:10, 31:8 <b>MDL</b> [3] - 10:5, 13:9, 23:1 <b>mean</b> [8] - 9:19, 31:18, 36:7, 39:2, 41:20,				

<p>42:2, 43:6, 48:17  <b>meaning</b> [3] - 9:6,  38:11, 48:20  <b>meaningful</b> [2] -  10:19, 22:22  <b>means</b> [1] - 40:19  <b>mechanical</b> [1] - 1:24  <b>medical</b> [18] - 5:15,  5:18, 28:14, 28:16,  28:20, 28:24, 28:25,  29:16, 30:4, 32:7,  33:10, 34:19, 35:20,  36:9, 37:9, 38:10,  41:16, 44:14  <b>medicine</b> [2] - 39:23,  44:5  <b>meet</b> [4] - 32:15,  32:23, 33:21, 34:16  <b>meeting</b> [2] - 13:8,  27:9  <b>member</b> [1] - 26:17  <b>members</b> [2] - 19:8,  21:1  <b>mental</b> [1] - 6:19  <b>mention</b> [4] - 29:6,  33:22, 36:6, 39:21  <b>mentioned</b> [8] - 31:13,  33:24, 34:15, 34:22,  34:23, 35:4, 35:18,  36:16  <b>mentioning</b> [2] -  34:18, 42:1  <b>mentions</b> [5] - 28:19,  31:12, 31:13, 34:20,  41:14  <b>Meridian</b> [1] - 2:19  <b>merit</b> [1] - 39:14  <b>merits</b> [8] - 11:5, 17:1,  19:8, 21:3, 28:11,  31:25, 36:23, 37:2  <b>met</b> [2] - 23:5, 38:11  <b>might</b> [4] - 11:2,  24:14, 40:19, 40:20  <b>million</b> [2] - 22:20,  23:19  <b>mindful</b> [1] - 12:13  <b>minimis</b> [10] - 31:20,  32:2, 35:6, 35:19,  36:15, 39:12, 42:12,  42:20, 42:24, 43:3  <b>misconduct</b> [1] - 40:2  <b>missing</b> [2] - 5:15,  6:19  <b>mission</b> [1] - 19:25  <b>Mitchell</b> [3] - 1:7, 1:22,  50:13  <b>modeled</b> [1] - 22:19  <b>modified</b> [1] - 11:11  <b>moment</b> [1] - 22:18  <b>monitoring</b> [18] -</p>	<p>28:14, 28:16, 28:20,  28:24, 28:25, 29:16,  30:4, 32:8, 33:10,  34:19, 35:20, 36:9,  37:9, 38:10, 40:7,  41:16, 42:5, 44:14  <b>month</b> [11] - 4:24, 5:6,  5:9, 5:17, 6:1, 6:10,  6:12, 7:8, 7:14, 33:1,  50:7  <b>month's</b> [2] - 5:6, 6:24  <b>months</b> [1] - 32:18  <b>morning</b> [3] - 8:18,  15:21, 37:15  <b>most</b> [5] - 12:1, 12:10,  18:9, 23:9, 23:13  <b>motion</b> [14] - 10:17,  13:5, 20:21, 20:23,  21:2, 22:17, 25:2,  26:11, 26:17, 28:12,  36:22, 37:12, 39:7,  44:15  <b>motions</b> [16] - 7:24,  9:1, 10:4, 10:22,  11:6, 11:15, 11:20,  12:14, 14:12, 15:15,  17:15, 18:5, 21:17,  21:18, 24:20, 26:19  <b>move</b> [9] - 4:18, 11:17,  18:7, 18:14, 20:1,  23:11, 24:20, 24:21,  24:23  <b>moves</b> [2] - 18:23,  23:14  <b>moving</b> [2] - 11:8,  15:17  <b>MR</b> [29] - 4:12, 4:20,  5:13, 7:4, 8:18, 8:22,  9:18, 9:21, 10:7,  10:10, 11:1, 15:21,  15:25, 20:18, 24:2,  25:16, 26:1, 26:7,  28:2, 47:19, 47:21,  48:2, 48:15, 48:20,  49:2, 49:6, 49:18,  49:22, 50:2  <b>MS</b> [19] - 6:5, 6:16,  6:25, 28:6, 37:15,  37:19, 38:17, 38:19,  41:11, 41:18, 41:24,  42:10, 43:14, 43:18,  44:11, 45:9, 45:12,  46:13, 47:11  <b>MSP</b> [5] - 20:22, 21:1,  21:4, 24:11, 26:15  <b>multiclass</b> [1] - 13:9  <b>multidistrict</b> [1] - 49:8  <b>Multidistrict</b> [1] - 13:3  <b>multiple</b> [5] - 13:24,  17:19, 19:22, 33:21</p>	<p><b>mélange</b> [1] - 18:2</p> <p><b>N</b></p> <p><b>name</b> [7] - 31:15,  31:21, 33:7, 37:15,  47:22  <b>named</b> [9] - 9:4,  19:15, 28:17, 29:14,  33:5, 35:5, 48:21,  48:24  <b>namely</b> [3] - 12:4,  13:4, 25:3  <b>narrow</b> [3] - 15:14,  21:17, 23:8  <b>nature</b> [3] - 13:11,  20:17, 39:12  <b>NDC</b> [1] - 30:20  <b>NDMA</b> [2] - 32:9, 33:9  <b>NE</b> [1] - 2:10  <b>near</b> [1] - 11:17  <b>nearly</b> [1] - 32:18  <b>need</b> [10] - 7:20,  23:14, 23:20, 23:21,  26:22, 32:11, 36:24,  45:15, 46:24, 49:14  <b>needed</b> [3] - 11:4,  32:17, 32:23  <b>needle</b> [2] - 24:21  <b>needs</b> [1] - 8:10  <b>negotiations</b> [1] -  36:18  <b>never</b> [14] - 17:19,  31:4, 31:12, 31:13,  33:17, 34:5, 34:6,  34:13, 34:15, 35:22,  37:5, 42:21, 42:25  <b>NEW</b> [1] - 1:1  <b>new</b> [3] - 5:8, 40:15,  41:5  <b>New</b> [13] - 1:8, 1:16,  2:7, 2:24, 9:6, 9:19,  9:21, 9:23, 9:24,  10:8, 10:13, 47:25  <b>next</b> [13] - 4:19, 5:6,  5:9, 5:17, 6:1, 6:12,  6:24, 7:14, 24:23,  25:21, 27:9, 45:20,  45:21  <b>NIGH</b> [1] - 5:13  <b>nobody</b> [1] - 42:25  <b>non</b> [2] - 20:3, 28:19  <b>non-dismissed</b> [1] -  28:19  <b>non-piecemeal</b> [1] -  20:3  <b>none</b> [3] - 39:15,  39:18, 42:15  <b>nonspecific</b> [1] -  25:11</p>	<p><b>North</b> [1] - 2:23  <b>Northern</b> [1] - 47:24  <b>noted</b> [3] - 4:23,  16:14, 17:11  <b>nothing</b> [4] - 8:23,  44:3, 47:19, 49:12  <b>notice</b> [7] - 21:16,  30:24, 37:22, 38:1,  39:5, 39:13, 47:8  <b>noticed</b> [1] - 39:3  <b>notion</b> [1] - 39:11  <b>NOWAK</b> [1] - 2:22  <b>Nowak</b> [1] - 47:23  <b>nowhere</b> [1] - 32:14  <b>number</b> [24] - 4:8,  4:22, 5:21, 7:4, 7:5,  7:6, 7:9, 7:10, 7:11,  7:12, 7:13, 7:19, 9:2,  9:3, 14:14, 17:21,  22:1, 22:9, 22:23,  24:13, 46:3  <b>Number</b> [1] - 11:13  <b>NUMBER</b> [1] - 1:3</p> <p><b>O</b></p> <p><b>O'Brien</b> [1] - 5:22  <b>objecting</b> [1] - 15:23  <b>objection</b> [1] - 5:14  <b>obsessive</b> [1] - 18:5  <b>obvious</b> [1] - 10:14  <b>obviously</b> [1] - 24:12  <b>occurred</b> [2] - 11:4,  34:13  <b>Official</b> [1] - 1:22  <b>one</b> [41] - 4:21, 7:25,  9:2, 9:4, 12:11, 13:3,  18:6, 18:19, 18:21,  18:22, 19:1, 19:6,  19:18, 19:19, 20:24,  21:11, 21:15, 21:21,  22:9, 24:18, 24:23,  25:3, 25:23, 26:3,  26:4, 26:8, 26:12,  27:12, 30:17, 31:20,  32:13, 33:18, 34:12,  36:1, 39:9, 40:2,  40:4, 40:8, 41:12,  47:21, 48:3  <b>one-off</b> [1] - 33:18  <b>one-way</b> [6] - 7:25,  19:1, 19:6, 20:24,  26:8, 26:12  <b>ones</b> [4] - 5:8, 14:6,  22:24, 23:5  <b>open</b> [2] - 6:7, 46:4  <b>opened</b> [1] - 6:8  <b>operative</b> [2] - 28:24,  38:4  <b>opine</b> [1] - 43:23</p>	<p><b>opinions</b> [1] - 12:16  <b>opp</b> [1] - 39:20  <b>opportunities</b> [1] -  46:15  <b>opportunity</b> [6] - 20:9,  21:11, 26:16, 26:18,  42:21, 44:7  <b>opposed</b> [2] - 39:15,  45:22  <b>opposition</b> [1] - 22:16  <b>opt</b> [1] - 8:13  <b>opt-in</b> [1] - 8:13  <b>opted</b> [1] - 13:13  <b>order</b> [12] - 5:6, 5:14,  5:20, 9:16, 9:17,  11:19, 24:8, 44:12,  48:11, 49:9, 49:13,  49:22  <b>Order</b> [1] - 11:13  <b>orders</b> [5] - 4:17, 5:1,  5:3, 5:9, 6:24  <b>original</b> [2] - 9:7,  48:22  <b>originally</b> [3] - 9:5,  9:23, 47:24  <b>Ostfeld</b> [1] - 15:22  <b>OSTFELD</b> [4] - 2:14,  15:21, 15:25, 26:1  <b>otherwise</b> [1] - 21:4  <b>ourselves</b> [1] - 48:7  <b>out-of-state</b> [1] - 8:14  <b>outcome</b> [1] - 16:16  <b>overarching</b> [1] -  45:23  <b>overview</b> [1] - 32:6  <b>own</b> [2] - 31:21, 32:2</p> <p><b>P</b></p> <p><b>P.C</b> [1] - 2:2  <b>page</b> [1] - 13:3  <b>pages</b> [1] - 38:4  <b>paid</b> [2] - 14:8, 23:23  <b>papers</b> [2] - 27:13,  44:8  <b>paragraph</b> [13] - 4:15,  28:20, 29:14, 30:4,  33:6, 34:18, 34:19,  34:22, 34:23, 35:12,  36:8, 38:21, 41:1  <b>paragraphs</b> [3] -  31:11, 31:18, 38:5  <b>parameters</b> [1] - 16:21  <b>pardon</b> [1] - 38:17  <b>Parkway</b> [2] - 1:16, 2:3  <b>part</b> [3] - 4:10, 14:8,  44:18  <b>particular</b> [5] - 11:22,  11:23, 36:12, 36:24  <b>particularly</b> [1] - 23:1</p>
---	---	--	---	---



<p><b>parties</b> [9] - 7:23, 11:7, 15:2, 18:16, 18:24, 21:16, 23:10, 36:17, 37:8</p> <p><b>party</b> [6] - 7:17, 16:13, 16:24, 18:6, 20:2, 34:4</p> <p><b>path</b> [1] - 17:24</p> <p><b>pathway</b> [1] - 10:6</p> <p><b>pause</b> [2] - 18:21, 38:3</p> <p><b>paying</b> [1] - 25:12</p> <p><b>Payne</b> [1] - 5:1</p> <p><b>PAYNE</b> [1] - 5:2</p> <p><b>payor</b> [4] - 7:18, 16:13, 16:24, 20:2</p> <p><b>pending</b> [4] - 5:1, 20:23, 24:19, 26:11</p> <p><b>Pennsylvania</b> [1] - 1:20</p> <p><b>people</b> [1] - 23:17</p> <p><b>percent</b> [7] - 32:19, 39:8, 40:10, 40:11, 41:2, 42:12, 42:17</p> <p><b>perhaps</b> [2] - 9:3, 40:15</p> <p><b>period</b> [1] - 21:16</p> <p><b>permit</b> [1] - 8:8</p> <p><b>permits</b> [1] - 9:12</p> <p><b>personal</b> [10] - 8:11, 10:11, 10:16, 10:19, 17:11, 17:14, 17:17, 17:20, 24:4</p> <p><b>pertain</b> [1] - 25:12</p> <p><b>petition</b> [1] - 49:13</p> <p><b>Peyton</b> [1] - 5:4</p> <p><b>PFS</b> [4] - 34:10, 34:24, 36:4, 44:23</p> <p><b>Pharma</b> [2] - 2:12, 2:17</p> <p><b>Pharmaceutical</b> [2] - 2:11, 2:16</p> <p><b>Pharmaceuticals</b> [2] - 2:12, 2:16</p> <p><b>pharmacies</b> [4] - 23:6, 29:2, 30:15, 40:20</p> <p><b>Pharmacy</b> [1] - 2:20</p> <p><b>pharmacy</b> [7] - 28:23, 29:12, 30:11, 30:24, 34:2, 34:11, 34:12</p> <p><b>Philadelphia</b> [1] - 1:20</p> <p><b>phone</b> [1] - 4:11</p> <p><b>picking</b> [1] - 26:9</p> <p><b>piecemeal</b> [5] - 16:8, 16:12, 17:3, 18:8, 20:3</p> <p><b>piecemealing</b> [1] - 18:9</p> <p><b>Piedmont</b> [1] - 2:10</p> <p><b>plaintiff</b> [22] - 6:17, 9:4, 11:23, 13:7,</p>	<p>20:15, 23:25, 27:8, 28:19, 30:18, 31:9, 32:9, 32:17, 34:1, 36:6, 36:8, 40:2, 40:4, 40:24, 42:16, 42:23, 47:1, 49:16</p> <p><b>plaintiff's</b> [3] - 19:19, 19:21, 35:18</p> <p><b>plaintiff/third</b> [1] - 20:2</p> <p><b>plaintiff/third-party</b> [1] - 20:2</p> <p><b>plaintiffs</b> [67] - 7:16, 8:14, 8:16, 11:4, 11:19, 13:12, 14:19, 17:5, 17:21, 18:10, 18:18, 19:14, 19:15, 20:20, 26:23, 28:14, 28:15, 28:17, 29:6, 29:13, 29:17, 29:18, 29:19, 29:23, 30:5, 30:16, 30:19, 30:22, 31:1, 31:3, 31:8, 31:15, 31:17, 31:20, 31:23, 32:10, 32:15, 32:17, 32:20, 32:25, 33:8, 33:16, 33:22, 34:13, 34:15, 35:3, 35:14, 35:17, 35:21, 35:22, 36:16, 36:17, 36:25, 37:3, 37:14, 37:17, 39:1, 43:1, 43:2, 43:21, 44:13, 45:13, 46:7, 46:14, 46:17, 47:7, 47:19</p> <p><b>Plaintiffs</b> [4] - 1:17, 1:20, 2:4, 2:8</p> <p><b>plaintiffs'</b> [7] - 8:9, 18:12, 32:1, 33:14, 36:14, 49:7, 50:1</p> <p><b>planning</b> [1] - 33:16</p> <p><b>played</b> [1] - 31:6</p> <p><b>plead</b> [2] - 28:21, 28:22</p> <p><b>pleaded</b> [4] - 28:15, 29:3, 30:1, 33:17</p> <p><b>pleadings</b> [3] - 28:8, 30:3, 46:4</p> <p><b>plenty</b> [2] - 40:16, 44:7</p> <p><b>point</b> [17] - 9:2, 9:3, 10:23, 17:14, 17:18, 19:1, 26:7, 30:22, 31:5, 38:7, 39:10, 40:1, 41:25, 45:15, 45:19, 46:19, 47:3</p> <p><b>points</b> [1] - 38:14</p> <p><b>position</b> [4] - 4:24, 10:3, 14:9, 30:21</p> <p><b>possible</b> [5] - 12:1,</p>	<p>12:10, 12:19, 18:13, 23:14</p> <p><b>potentially</b> [5] - 23:11, 24:19, 24:21, 32:2, 35:9</p> <p><b>practical</b> [1] - 24:20</p> <p><b>practice</b> [1] - 13:5</p> <p><b>precedent</b> [1] - 19:20</p> <p><b>precisely</b> [4] - 10:5, 12:3, 14:2, 31:14</p> <p><b>preclusion</b> [1] - 19:13</p> <p><b>preclusive</b> [2] - 25:16, 25:24</p> <p><b>predisposition</b> [1] - 16:17</p> <p><b>preference</b> [1] - 18:3</p> <p><b>prejudice</b> [9] - 33:19, 37:3, 37:7, 37:23, 39:4, 40:14, 42:7, 42:19</p> <p><b>prejudiced</b> [1] - 31:16</p> <p><b>premature</b> [1] - 28:10</p> <p><b>prepare</b> [1] - 31:3</p> <p><b>prepared</b> [3] - 14:20, 15:11, 25:6</p> <p><b>prescription</b> [2] - 22:4, 25:12</p> <p><b>prescriptions</b> [2] - 23:18, 29:15</p> <p><b>PRESENT</b> [1] - 3:1</p> <p><b>present</b> [2] - 23:8, 26:14</p> <p><b>presentation</b> [1] - 16:1</p> <p><b>presented</b> [3] - 13:9, 44:16, 44:24</p> <p><b>presently</b> [1] - 25:1</p> <p><b>presents</b> [1] - 12:20</p> <p><b>press</b> [1] - 36:14</p> <p><b>pressure</b> [1] - 23:16</p> <p><b>presumably</b> [1] - 33:5</p> <p><b>pretrial</b> [2] - 9:1, 10:4</p> <p><b>prevail</b> [1] - 24:14</p> <p><b>prevent</b> [1] - 7:22</p> <p><b>prevents</b> [1] - 8:24</p> <p><b>previous</b> [1] - 48:3</p> <p><b>pricing</b> [1] - 40:8</p> <p><b>primer</b> [1] - 13:1</p> <p><b>Princeton</b> [2] - 9:11, 10:12</p> <p><b>problem</b> [12] - 8:6, 8:17, 8:21, 19:1, 19:7, 20:18, 26:8, 26:13, 26:15, 37:7, 45:25</p> <p><b>procedural</b> [2] - 28:12, 46:21</p> <p><b>procedure</b> [2] - 18:18, 18:19</p> <p><b>proceed</b> [14] - 6:9,</p>	<p>9:12, 10:1, 14:11, 15:2, 16:11, 16:23, 18:5, 20:6, 20:7, 20:15, 21:9, 21:19, 23:9</p> <p><b>proceeding</b> [5] - 19:7, 19:19, 20:3, 21:4, 44:20</p> <p><b>Proceedings</b> [2] - 1:24, 50:8</p> <p><b>proceedings</b> [7] - 13:9, 13:14, 16:12, 18:2, 19:22, 50:11</p> <p><b>PROCEEDINGS</b> [1] - 4:1</p> <p><b>process</b> [7] - 16:21, 21:5, 21:20, 24:19, 35:25, 38:24, 42:2</p> <p><b>produce</b> [1] - 34:3</p> <p><b>produced</b> [3] - 1:25, 34:6, 34:8</p> <p><b>produces</b> [1] - 25:4</p> <p><b>product</b> [5] - 30:8, 30:9, 30:10, 30:23, 31:10</p> <p><b>PRODUCTS</b> [1] - 1:4</p> <p><b>products</b> [1] - 30:8</p> <p><b>profound</b> [1] - 10:13</p> <p><b>program</b> [1] - 40:8</p> <p><b>prolong</b> [1] - 24:24</p> <p><b>proof</b> [1] - 34:9</p> <p><b>proper</b> [2] - 21:12, 41:15</p> <p><b>properly</b> [2] - 39:3</p> <p><b>proposal</b> [6] - 8:9, 15:5, 17:1, 17:3, 17:9, 27:9</p> <p><b>proposed</b> [20] - 9:4, 11:10, 11:25, 12:24, 14:11, 17:6, 17:25, 18:10, 18:12, 21:9, 21:11, 21:23, 22:13, 25:2, 31:23, 32:15, 32:17, 32:20, 32:25, 35:22</p> <p><b>Proposed</b> [1] - 13:2</p> <p><b>proposing</b> [6] - 10:21, 12:1, 12:13, 18:19, 19:14</p> <p><b>protestation</b> [1] - 11:12</p> <p><b>provide</b> [2] - 11:5, 15:2</p> <p><b>providers</b> [3] - 13:22, 14:3, 23:3</p> <p><b>provides</b> [1] - 12:23</p> <p><b>prudently</b> [1] - 16:14</p> <p><b>purchase</b> [1] - 14:8</p> <p><b>purchased</b> [4] - 30:9, 46:10, 47:9</p>	<p><b>purchaser</b> [3] - 14:5, 14:9, 25:13</p> <p><b>purchasers</b> [7] - 13:23, 14:3, 22:1, 22:24, 23:2, 23:3, 23:23</p> <p><b>purposes</b> [2] - 16:10, 39:2</p> <p><b>pursue</b> [2] - 11:20, 35:9</p> <p><b>pursuing</b> [1] - 35:3</p> <p><b>put</b> [11] - 18:4, 18:10, 18:11, 18:12, 18:21, 21:17, 23:16, 32:9, 32:22, 42:12, 48:4</p> <p><b>putative</b> [1] - 36:5</p> <p><b>putting</b> [4] - 17:8, 20:5, 20:10, 22:18</p>
<b>Q</b>				
<p><b>quantity</b> [1] - 32:11</p> <p><b>questioned</b> [1] - 34:14</p> <p><b>questions</b> [5] - 32:1, 33:14, 39:16, 41:8, 42:14</p> <p><b>quick</b> [2] - 38:3, 38:24</p> <p><b>quickly</b> [2] - 23:14, 48:2</p> <p><b>quite</b> [2] - 29:7</p> <p><b>quote</b> [1] - 13:7</p>				
<b>R</b>				
<p><b>Rachel</b> [1] - 37:16</p> <p><b>RACHEL</b> [1] - 2:6</p> <p><b>raise</b> [3] - 47:7, 47:18, 48:2</p> <p><b>raised</b> [4] - 7:16, 7:19, 8:11, 27:12</p> <p><b>raising</b> [1] - 49:10</p> <p><b>rather</b> [3] - 25:12, 37:21, 37:25</p> <p><b>Raymond</b> [1] - 5:21</p> <p><b>RDR</b> [2] - 1:22, 50:13</p> <p><b>RE</b> [1] - 1:4</p> <p><b>reach</b> [1] - 36:6</p> <p><b>ready</b> [3] - 9:25, 21:19, 21:21</p> <p><b>real</b> [2] - 35:19, 37:7</p> <p><b>really</b> [31] - 5:16, 6:6, 8:4, 8:23, 9:19, 9:21, 12:23, 14:5, 14:11, 14:13, 18:14, 19:1, 22:1, 22:9, 22:16, 22:17, 24:9, 24:16, 24:20, 25:4, 25:10, 25:13, 26:8, 30:2, 31:18, 36:7, 37:5, 42:1, 42:19, 43:7</p> <p><b>reason</b> [6] - 5:17,</p>				

<p>12:6, 16:14, 17:5, 21:23, 42:11</p> <p><b>reasons</b> [4] - 14:10, 17:8, 24:13, 35:5</p> <p><b>recently</b> [1] - 14:24</p> <p><b>record</b> [4] - 9:9, 34:4, 40:16, 50:11</p> <p><b>recorded</b> [1] - 1:24</p> <p><b>Records</b> [2] - 34:3, 34:8</p> <p><b>records</b> [5] - 6:20, 34:3, 34:6, 34:8, 34:12</p> <p><b>reference</b> [1] - 36:13</p> <p><b>referenced</b> [1] - 34:9</p> <p><b>references</b> [1] - 34:24</p> <p><b>referring</b> [1] - 27:16</p> <p><b>refresh</b> [1] - 12:25</p> <p><b>regarding</b> [2] - 31:22, 36:14</p> <p><b>regardless</b> [1] - 29:10</p> <p><b>regional</b> [1] - 13:24</p> <p><b>regret</b> [1] - 41:2</p> <p><b>regulatory</b> [1] - 30:7</p> <p><b>rehash</b> [1] - 22:16</p> <p><b>reiterate</b> [1] - 25:6</p> <p><b>relate</b> [1] - 31:11</p> <p><b>Related</b> [1] - 13:2</p> <p><b>related</b> [1] - 42:15</p> <p><b>relates</b> [1] - 36:2</p> <p><b>relating</b> [6] - 30:13, 30:14, 31:10, 31:12, 36:15</p> <p><b>relatively</b> [3] - 16:7, 17:3, 39:22</p> <p><b>relevance</b> [1] - 39:10</p> <p><b>relevant</b> [1] - 41:20</p> <p><b>relisted</b> [1] - 7:2</p> <p><b>reluctant</b> [1] - 46:4</p> <p><b>rely</b> [2] - 31:20, 45:19</p> <p><b>relying</b> [2] - 29:24, 33:16</p> <p><b>remains</b> [1] - 37:1</p> <p><b>remand</b> [1] - 10:4</p> <p><b>remanded</b> [1] - 36:10</p> <p><b>remanding</b> [1] - 9:1</p> <p><b>remedial</b> [1] - 44:3</p> <p><b>remedy</b> [3] - 37:21, 40:23, 42:5</p> <p><b>remember</b> [1] - 32:7</p> <p><b>remove</b> [1] - 7:5</p> <p><b>removed</b> [7] - 48:3, 48:8, 48:15, 48:17, 48:23, 49:8, 49:9</p> <p><b>rendered</b> [1] - 18:22</p> <p><b>rep</b> [2] - 38:9, 38:10</p> <p><b>repeated</b> [1] - 34:15</p> <p><b>repeatedly</b> [1] - 11:21</p> <p><b>reply</b> [1] - 12:22</p>	<p><b>Reporter</b> [1] - 1:22</p> <p><b>reporter</b> [1] - 28:5</p> <p><b>Reporter/Transcriber</b> [1] - 50:13</p> <p><b>reports</b> [3] - 11:6, 11:15, 31:24</p> <p><b>represent</b> [1] - 47:23</p> <p><b>representative</b> [4] - 36:5, 41:16, 41:21, 46:9</p> <p><b>represented</b> [2] - 49:16, 49:18</p> <p><b>reps</b> [2] - 39:1, 40:17</p> <p><b>requested</b> [3] - 6:20, 48:10</p> <p><b>requests</b> [1] - 34:16</p> <p><b>require</b> [4] - 9:8, 16:17, 16:20, 16:21</p> <p><b>requiring</b> [1] - 33:1</p> <p><b>reserved</b> [1] - 17:18</p> <p><b>resident</b> [3] - 28:21, 29:11, 29:21</p> <p><b>residents</b> [1] - 29:11</p> <p><b>resolution</b> [4] - 15:17, 23:11, 23:15, 27:5</p> <p><b>resolved</b> [2] - 8:3, 8:15</p> <p><b>respect</b> [10] - 16:1, 18:16, 18:17, 31:6, 35:6, 35:17, 40:6, 43:2, 44:18, 46:23</p> <p><b>respectfully</b> [7] - 19:20, 19:24, 21:1, 24:25, 37:8, 40:13, 40:22</p> <p><b>respects</b> [1] - 12:8</p> <p><b>respond</b> [2] - 43:14, 47:8</p> <p><b>responded</b> [1] - 11:24</p> <p><b>response</b> [3] - 5:24, 45:3, 50:5</p> <p><b>rest</b> [1] - 7:7</p> <p><b>result</b> [1] - 9:16</p> <p><b>RET</b> [1] - 1:12</p> <p><b>retail</b> [4] - 30:11, 30:23, 31:9, 44:22</p> <p><b>Retailer</b> [1] - 2:20</p> <p><b>retailer</b> [1] - 42:4</p> <p><b>retailers</b> [1] - 41:19</p> <p><b>review</b> [3] - 16:20, 18:22, 21:3</p> <p><b>Richard</b> [2] - 7:13</p> <p><b>rights</b> [2] - 21:5, 21:7</p> <p><b>rises</b> [1] - 5:16</p> <p><b>risk</b> [4] - 22:6, 32:10, 38:12, 39:11</p> <p><b>Rite</b> [1] - 2:21</p> <p><b>RMR</b> [2] - 1:22, 50:13</p> <p><b>road</b> [3] - 23:5, 26:6,</p>	<p>47:2</p> <p><b>Road</b> [1] - 2:10</p> <p><b>ROBERT</b> [2] - 1:10, 4:2</p> <p><b>Robert</b> [11] - 3:2, 5:10, 29:6, 29:8, 29:10, 33:23, 33:24, 34:18, 35:9, 41:14, 49:18</p> <p><b>role</b> [1] - 31:5</p> <p><b>rolled</b> [1] - 25:17</p> <p><b>Roseland</b> [1] - 1:16</p> <p><b>roughly</b> [1] - 13:22</p> <p><b>route</b> [2] - 26:23, 26:24</p> <p><b>rubber</b> [1] - 23:5</p> <p><b>Ruben</b> [1] - 8:18</p> <p><b>RUBEN</b> [1] - 1:19</p> <p><b>rule</b> [1] - 16:18</p> <p><b>Rule</b> [8] - 7:22, 10:5, 12:15, 16:20, 18:21, 26:16, 39:5, 39:21</p> <p><b>ruled</b> [1] - 20:8</p> <p><b>rules</b> [1] - 10:5</p> <p><b>ruling</b> [11] - 15:11, 16:17, 20:7, 21:2, 21:7, 21:13, 21:14, 21:15, 29:1, 46:23</p> <p><b>rulings</b> [3] - 14:25, 16:19, 19:3</p> <p><b>Russell</b> [1] - 7:5</p>	<p>14:22, 21:12</p> <p><b>Serious</b> [1] - 6:3</p> <p><b>serious</b> [1] - 35:25</p> <p><b>SERIOUS</b> [1] - 2:2</p> <p><b>seriously</b> [1] - 38:12</p> <p><b>Service</b> [2] - 34:3, 34:8</p> <p><b>set</b> [2] - 18:4, 27:11</p> <p><b>setting</b> [2] - 16:11, 23:1</p> <p><b>settlement</b> [2] - 18:17, 36:18</p> <p><b>sever</b> [3] - 7:22, 10:4, 19:12</p> <p><b>several</b> [1] - 42:15</p> <p><b>severed</b> [2] - 19:19, 25:19</p> <p><b>severing</b> [2] - 9:1, 19:14</p> <p><b>share</b> [1] - 24:4</p> <p><b>shed</b> [1] - 12:15</p> <p><b>sheet</b> [7] - 30:18, 30:20, 35:1, 35:4, 35:11, 45:17, 45:22</p> <p><b>sheets</b> [2] - 6:17, 44:23</p> <p><b>Shelton</b> [1] - 47:23</p> <p><b>SHELTON</b> [1] - 2:22</p> <p><b>Shemes</b> [1] - 5:4</p> <p><b>SHEMES</b> [1] - 5:4</p> <p><b>Shield</b> [1] - 13:20</p> <p><b>ShopRite</b> [6] - 29:9, 33:25, 34:4, 34:9, 34:10, 35:7</p> <p><b>short</b> [1] - 40:22</p> <p><b>show</b> [10] - 4:17, 5:1, 5:3, 5:6, 5:9, 5:14, 5:20, 6:24, 48:11, 49:13</p> <p><b>side</b> [4] - 10:11, 14:15, 40:8</p> <p><b>sidelines</b> [1] - 19:16</p> <p><b>sides</b> [1] - 49:25</p> <p><b>signed</b> [2] - 15:18, 49:25</p> <p><b>significant</b> [5] - 12:7, 42:19, 42:22, 43:3, 45:24</p> <p><b>similar</b> [1] - 48:3</p> <p><b>simple</b> [2] - 17:25, 27:6</p> <p><b>simplifying</b> [1] - 18:18</p> <p><b>simply</b> [3] - 14:8, 16:23, 28:15</p> <p><b>single</b> [6] - 17:4, 17:25, 20:1, 20:15, 23:25, 24:17</p> <p><b>six</b> [1] - 33:1</p> <p><b>skin</b> [2] - 22:12, 23:10</p> <p><b>skis</b> [1] - 10:18</p>	<p><b>SLATER</b> [4] - 1:15, 1:15, 10:7, 47:19</p> <p><b>Slater</b> [1] - 10:7</p> <p><b>slight</b> [1] - 14:7</p> <p><b>smaller</b> [1] - 25:8</p> <p><b>SMITH</b> [1] - 3:2</p> <p><b>Smith</b> [3] - 6:13, 6:14, 7:10</p> <p><b>so-called</b> [1] - 39:12</p> <p><b>Solco</b> [2] - 9:10, 10:11</p> <p><b>sold</b> [3] - 30:23, 31:8, 34:20</p> <p><b>solely</b> [1] - 31:11</p> <p><b>solve</b> [2] - 19:12, 19:17</p> <p><b>someone</b> [3] - 9:22, 15:19, 25:12</p> <p><b>somewhat</b> [1] - 11:11</p> <p><b>sooner</b> [1] - 50:7</p> <p><b>sorry</b> [2] - 7:13, 48:19</p> <p><b>sort</b> [9] - 8:12, 11:16, 15:17, 16:2, 24:14, 42:1, 49:9, 49:13, 49:23</p> <p><b>sound</b> [1] - 37:11</p> <p><b>speaking</b> [2] - 15:22, 37:17</p> <p><b>speaks</b> [1] - 23:1</p> <p><b>SPECIAL</b> [26] - 1:12, 4:2, 4:5, 27:16, 27:19, 27:23, 27:25, 28:4, 37:10, 37:18, 38:16, 38:18, 41:9, 41:12, 41:23, 42:8, 43:12, 43:16, 44:9, 44:12, 45:4, 45:6, 45:11, 46:1, 47:5, 47:12</p> <p><b>specific</b> [3] - 19:15, 24:8, 40:9</p> <p><b>specifically</b> [5] - 29:17, 34:9, 34:18, 34:20, 42:15</p> <p><b>speed</b> [1] - 48:13</p> <p><b>spent</b> [1] - 24:16</p> <p><b>spin</b> [1] - 18:20</p> <p><b>split</b> [3] - 13:7, 13:11, 19:21</p> <p><b>splitting</b> [2] - 19:13, 19:18</p> <p><b>stakes</b> [1] - 23:18</p> <p><b>stand</b> [1] - 14:19</p> <p><b>standard</b> [1] - 5:16</p> <p><b>standing</b> [1] - 44:17</p> <p><b>stands</b> [1] - 14:9</p> <p><b>start</b> [3] - 4:10, 17:15, 44:21</p> <p><b>state</b> [4] - 8:14, 10:14, 17:21, 30:19</p> <p><b>statement</b> [4] - 4:24,</p>
---	---	--	---	---

<p>29:6, 30:22, 33:20  <b>States</b> [1] - 34:20  <b>STATES</b> [2] - 1:1, 1:11  <b>states</b> [3] - 17:6, 17:22, 22:15  <b>states'</b> [1] - 20:16  <b>stenography</b> [1] - 1:24  <b>step</b> [3] - 11:2, 11:4, 45:20  <b>Steve</b> [1] - 4:13  <b>STEVEN</b> [1] - 2:10  <b>Stiles</b> [1] - 7:10  <b>STILES</b> [1] - 7:10  <b>still</b> [8] - 5:18, 10:3, 10:16, 20:14, 23:20, 24:11, 26:24, 35:10  <b>stipulation</b> [2] - 49:24, 49:25  <b>stop</b> [2] - 14:1, 46:17  <b>straightforward</b> [4] - 12:10, 16:7, 17:4, 17:25  <b>straws</b> [2] - 29:24, 33:22  <b>stream</b> [1] - 31:12  <b>streamlined</b> [1] - 12:10  <b>Street</b> [4] - 1:19, 2:7, 2:19, 2:23  <b>Streets</b> [1] - 1:7  <b>strictly</b> [3] - 22:13, 22:20  <b>stuff</b> [2] - 23:22, 26:21  <b>subclass</b> [2] - 25:3, 36:10  <b>subclasses</b> [2] - 8:25, 17:6  <b>subject</b> [1] - 17:12  <b>submitted</b> [4] - 34:10, 41:13, 46:6, 46:7  <b>subscribers</b> [3] - 13:22, 14:3, 23:3  <b>subset</b> [1] - 13:15  <b>subsidiaries</b> [2] - 9:24, 10:12  <b>substantive</b> [3] - 21:7, 28:12, 33:8  <b>sued</b> [1] - 13:15  <b>sufficient</b> [4] - 32:9, 32:11, 32:15, 32:21  <b>suggest</b> [1] - 31:7  <b>suggesting</b> [4] - 15:7, 26:23, 27:2, 35:14  <b>sui</b> [1] - 14:16  <b>suit</b> [1] - 36:12  <b>Suite</b> [3] - 1:19, 2:10, 2:15  <b>summary</b> [8] - 8:25, 10:3, 15:1, 21:9, 21:10, 23:7, 28:11,</p>	<p>44:19  <b>summer</b> [1] - 4:7  <b>supposed</b> [7] - 31:17, 35:2, 35:16, 36:4, 43:5, 43:11  <b>surprise</b> [4] - 42:6, 43:20, 44:6  <b>suspect</b> [1] - 33:18</p> <p style="text-align: center;"><b>T</b></p> <p><b>tacked</b> [1] - 11:11  <b>tactical</b> [1] - 41:4  <b>targeting</b> [1] - 35:17  <b>task</b> [2] - 13:17, 19:4  <b>team</b> [1] - 9:22  <b>tease</b> [1] - 24:8  <b>tee</b> [3] - 15:2, 24:7, 42:21  <b>teed</b> [2] - 9:25, 42:21  <b>telephonically</b> [1] - 4:1  <b>ten</b> [1] - 7:1  <b>tentative</b> [1] - 14:25  <b>term</b> [1] - 40:18  <b>termination</b> [2] - 18:15, 20:4  <b>terms</b> [3] - 14:22, 15:16, 26:5  <b>Test</b> [1] - 2:24  <b>Teva</b> [11] - 2:11, 2:12, 2:16, 2:16, 4:13, 10:12, 12:4, 12:6, 22:21, 34:21  <b>text</b> [1] - 13:10  <b>The Court</b> [70] - 4:4, 4:7, 4:15, 4:25, 5:19, 5:25, 6:10, 6:22, 7:1, 7:9, 8:20, 8:24, 9:15, 9:19, 10:2, 10:21, 11:4, 12:15, 12:25, 14:21, 15:4, 15:8, 15:10, 15:18, 15:24, 16:3, 16:6, 16:9, 16:18, 16:24, 17:17, 18:3, 18:11, 18:12, 18:13, 18:24, 19:2, 19:4, 20:12, 21:10, 21:12, 23:13, 25:1, 25:7, 25:14, 26:2, 26:18, 27:18, 27:22, 27:24, 28:3, 28:10, 45:5, 45:8, 45:10, 47:16, 48:1, 48:10, 48:12, 48:17, 48:25, 49:3, 49:7, 49:16, 49:20, 49:23, 49:24, 50:4, 50:6  <b>theirs</b> [1] - 21:6  <b>themselves</b> [4] -</p>	<p>32:11, 32:15, 32:20, 35:21  <b>theories</b> [1] - 44:3  <b>therefore</b> [1] - 9:13  <b>thinking</b> [1] - 24:17  <b>Third</b> [4] - 8:13, 18:22, 19:20, 20:9  <b>third</b> [6] - 6:2, 7:17, 16:13, 16:24, 18:6, 34:4  <b>third-party</b> [5] - 7:17, 16:13, 16:24, 18:6, 34:4  <b>THOMAS</b> [2] - 1:12, 4:2  <b>THORNBURG</b> [1] - 2:18  <b>three</b> [2] - 28:17, 29:19  <b>threshold</b> [6] - 31:22, 33:2, 35:21, 38:11, 39:22, 40:10  <b>ticking</b> [1] - 44:21  <b>tied</b> [1] - 39:24  <b>ties</b> [1] - 40:3  <b>timetable</b> [1] - 11:14  <b>today</b> [6] - 4:9, 13:4, 24:3, 28:7, 45:7, 48:6  <b>today's</b> [1] - 41:14  <b>together</b> [2] - 22:15, 27:8  <b>Tolley</b> [1] - 5:4  <b>tomorrow</b> [1] - 27:2  <b>took</b> [14] - 16:5, 16:10, 24:2, 30:6, 32:19, 33:1, 33:11, 38:11, 38:21, 39:8, 39:23, 39:25, 40:9, 40:17  <b>topic</b> [1] - 13:4  <b>Tops</b> [3] - 2:24, 47:23, 48:21  <b>Torrent</b> [4] - 10:13, 12:5, 12:6, 22:21  <b>toward</b> [2] - 14:20, 23:11  <b>towards</b> [4] - 15:17, 16:12, 16:25, 20:1  <b>TPP</b> [15] - 7:18, 8:24, 14:15, 15:10, 20:15, 20:20, 21:21, 22:23, 23:25, 24:6, 24:18, 26:5, 26:10, 26:25, 27:8  <b>TPPs</b> [4] - 14:4, 14:7, 22:3, 24:13  <b>track</b> [5] - 13:24, 15:6, 18:12, 19:25  <b>tracks</b> [1] - 13:21  <b>transcript</b> [2] - 1:24,</p>	<p>50:10  <b>transcription</b> [1] - 1:25  <b>transcripts</b> [1] - 36:5  <b>transfer</b> [1] - 9:8  <b>transferee</b> [2] - 9:2, 25:20  <b>transferred</b> [1] - 34:12  <b>transparent</b> [1] - 43:19  <b>Traurig</b> [1] - 4:13  <b>TRAURIG</b> [2] - 2:9, 2:14  <b>tremendous</b> [1] - 14:22  <b>triable</b> [1] - 17:10  <b>trial</b> [34] - 7:18, 9:5, 11:16, 12:4, 13:5, 14:11, 14:20, 14:21, 15:10, 16:6, 16:10, 16:11, 16:25, 17:4, 17:16, 18:1, 18:11, 18:16, 20:2, 20:15, 21:3, 21:10, 21:18, 22:22, 23:13, 24:10, 24:15, 24:18, 24:23, 25:21, 26:25, 27:1, 27:11, 46:3  <b>trials</b> [2] - 8:5, 19:22  <b>tried</b> [4] - 12:11, 18:6, 19:19, 20:2  <b>Trimboli</b> [1] - 7:11  <b>TRIMBOLI</b> [1] - 7:11  <b>Trischler</b> [1] - 15:18  <b>true</b> [1] - 22:3  <b>try</b> [7] - 6:10, 6:12, 6:23, 8:8, 18:14, 20:22, 27:8  <b>trying</b> [5] - 7:17, 36:23, 37:4, 39:5, 46:20  <b>turn</b> [1] - 30:10  <b>two</b> [6] - 8:12, 9:3, 9:4, 13:21, 33:3, 33:11  <b>type</b> [2] - 13:8, 44:19  <b>types</b> [1] - 41:21  <b>typical</b> [2] - 39:25, 44:6  <b>typicality</b> [3] - 39:24, 42:22, 44:1  <b>typically</b> [1] - 13:7</p> <p style="text-align: center;"><b>U</b></p> <p><b>U.S</b> [1] - 1:7  <b>ultimate</b> [2] - 18:15, 20:4  <b>unasserted</b> [3] - 29:25, 46:25, 47:3  <b>under</b> [5] - 7:22, 29:1,</p>	<p>44:1, 44:2  <b>underscore</b> [1] - 42:2  <b>United</b> [1] - 34:20  <b>UNITED</b> [2] - 1:1, 1:11  <b>unless</b> [1] - 9:22  <b>unlimited</b> [1] - 13:9  <b>unpleaded</b> [1] - 46:25  <b>untethered</b> [2] - 11:21, 11:22  <b>up</b> [30] - 6:7, 6:8, 9:25, 10:17, 13:7, 13:11, 14:12, 14:20, 15:2, 16:23, 17:16, 19:15, 24:7, 26:5, 27:11, 27:19, 28:13, 31:17, 36:21, 39:24, 42:10, 42:13, 42:21, 42:25, 44:19, 46:4, 47:1, 47:2, 48:12  <b>update</b> [2] - 4:21, 6:6  <b>updates</b> [2] - 7:3, 7:4  <b>US</b> [1] - 10:12  <b>USA</b> [4] - 2:12, 2:16, 10:12, 10:13  <b>usage</b> [2] - 32:3, 43:20  <b>usages</b> [1] - 43:21  <b>useful</b> [1] - 11:3  <b>Utica</b> [2] - 49:19, 49:20</p> <p style="text-align: center;"><b>V</b></p> <p><b>valsartan</b> [22] - 23:6, 23:7, 29:8, 30:6, 31:2, 31:8, 32:8, 32:12, 32:14, 32:22, 32:23, 33:3, 33:11, 38:12, 38:22, 39:9, 40:19, 41:2, 46:10, 47:10  <b>VALSARTAN</b> [1] - 1:4  <b>value</b> [1] - 24:3  <b>Vanaskie</b> [4] - 4:4, 11:9, 11:25, 27:14  <b>VANASKIE</b> [26] - 1:12, 4:2, 4:5, 27:16, 27:19, 27:23, 27:25, 28:4, 37:10, 37:18, 38:16, 38:18, 41:9, 41:12, 41:23, 42:8, 43:12, 43:16, 44:9, 44:12, 45:4, 45:6, 45:11, 46:1, 47:5, 47:12  <b>venue</b> [1] - 9:7  <b>via</b> [1] - 39:25  <b>view</b> [3] - 24:5, 24:16  <b>Vindigni</b> [2] - 5:5, 47:24  <b>VINDIGNI</b> [1] - 5:5</p>
--	--	---	---	--

<b>Vindignis</b> <sup>[1]</sup> - 48:4 <b>violate</b> <sup>[1]</sup> - 21:4 <b>violated</b> <sup>[1]</sup> - 21:6	<b>worth</b> <sup>[1]</sup> - 23:22 <b>wrap</b> <sup>[1]</sup> - 36:21 <b>wrinkles</b> <sup>[1]</sup> - 14:16
<b>W</b>	<b>Y</b>
<b>Wacker</b> <sup>[1]</sup> - 2:15 <b>wait</b> <sup>[1]</sup> - 19:9 <b>waiting</b> <sup>[2]</sup> - 6:8, 6:21 <b>waiver</b> <sup>[2]</sup> - 9:13, 10:1 <b>waivers</b> <sup>[2]</sup> - 8:7, 17:23 <b>Walid</b> <sup>[1]</sup> - 7:12 <b>Walker</b> <sup>[1]</sup> - 5:2 <b>Walmart</b> <sup>[4]</sup> - 30:11, 30:23, 31:8, 33:4 <b>wants</b> <sup>[3]</sup> - 18:4, 18:14, 25:7 <b>warrant</b> <sup>[2]</sup> - 32:16, 33:10 <b>warranty</b> <sup>[18]</sup> - 12:2, 12:9, 12:14, 12:16, 14:6, 15:7, 15:14, 22:13, 22:14, 22:20, 23:8, 25:3, 25:18, 25:21, 25:22, 25:25, 28:24 <b>ways</b> <sup>[1]</sup> - 46:3 <b>week</b> <sup>[3]</sup> - 6:6, 6:19, 11:25 <b>weigh</b> <sup>[2]</sup> - 20:10, 21:11 <b>Weinstein</b> <sup>[1]</sup> - 14:23 <b>West</b> <sup>[1]</sup> - 2:15 <b>whereas</b> <sup>[1]</sup> - 14:15 <b>White</b> <sup>[1]</sup> - 5:2 <b>whole</b> <sup>[1]</sup> - 41:7 <b>wholesaler</b> <sup>[2]</sup> - 30:22, 31:6 <b>wholesalers</b> <sup>[1]</sup> - 30:14 <b>wide</b> <sup>[1]</sup> - 25:17 <b>William</b> <sup>[1]</sup> - 4:22 <b>Williams</b> <sup>[2]</sup> - 5:2, 7:13 <b>Wilson</b> <sup>[1]</sup> - 7:13 <b>Wineinger</b> <sup>[3]</sup> - 9:9, 9:15, 10:2 <b>Wineinger's</b> <sup>[1]</sup> - 18:11 <b>wish</b> <sup>[1]</sup> - 45:13 <b>withdraw</b> <sup>[1]</sup> - 4:22 <b>wonder</b> <sup>[1]</sup> - 45:20 <b>word</b> <sup>[2]</sup> - 11:21, 13:10 <b>workable</b> <sup>[1]</sup> - 17:9 <b>works</b> <sup>[1]</sup> - 35:23 <b>worlds</b> <sup>[4]</sup> - 15:13, 21:24, 22:8, 24:25 <b>worse</b> <sup>[1]</sup> - 26:4	<b>years</b> <sup>[4]</sup> - 10:15, 33:3, 33:11, 44:5 <b>York</b> <sup>[4]</sup> - 2:7, 2:24, 47:25 <b>Z</b> <b>Zher</b> <sup>[28]</sup> - 29:25, 30:5, 30:9, 30:16, 30:17, 31:3, 31:18, 32:4, 32:13, 32:19, 33:1, 33:2, 33:11, 33:17, 36:16, 38:8, 38:21, 40:17, 41:1, 44:1, 44:4, 44:18, 44:25, 45:23, 46:9, 46:24, 47:9 <b>Zher's</b> <sup>[2]</sup> - 30:25, 36:2 <b>ZHP</b> <sup>[19]</sup> - 5:10, 12:4, 12:7, 15:9, 22:21, 30:5, 30:7, 30:9, 30:10, 30:23, 31:2, 31:8, 31:11, 31:12, 33:1, 33:11, 34:20, 34:25 <b>ZHP's</b> <sup>[2]</sup> - 33:2, 33:3 <b>ZHP/Teva/Torrent</b> <sup>[2]</sup> - 22:13, 25:4 <b>ZHP/Walmart/McKesson</b> <sup>[1]</sup> - 33:5 <b>Zyprexa</b> <sup>[1]</sup> - 14:23